TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 232.

WILLIAM F. GRAHAM AND AMELIA TERESA RAYMOND, APPELLANTS,

vs.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JUNE 1, 1883.

The taking of a greater rate than seven per cent. would be contrary to law, and, if insisted upon, would avoid the debt.

Referee's Record, folio 23, p. 9.

V.

These payments in one year, aggregating $6,301.25 (Record, p. 8) should at least have the effect of reducing the principal sum, in which case, allowing interest at seven per cent., and crediting the payment of April 6th, 1876, of $500, (Record, folio 24, p. 9) also crediting avails of bonds on March 24th, 1881, $4,987.50, shows that Hoyt paid the plaintiff, including interest on such payments to March 24, 1881, the sum of $14,944.23; while there was due at the last named date on said debt of Hoyt to the plaintiff, the sum of $15,134.85. Therefore, if our computation is correct, there was due the plaintiff from Hoyt, for which the note in this suit was collateral, at the time of the bringing of this suit, the sum of $190.62, with interest from March 24, 1881.

It is needless to say that the plaintiff's claim in this suit is unconscionable, if not unlawful.

Dan'l. Roberts
Of Counsel

Guy C. Noble
E. C. Smith
Atty. for Deft.

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1 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

At a circuit court of the United States for the first circuit began and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of October, in the year of our Lord one thousand eight hundred and eighty-two, the fifteenth day of said October happening on a Sunday.

Before the Honorable John Lowell, circuit judge.

WILLIAM F. GRAHAM *et al.*, Complainants,
v.
BOSTON, HARTFORD & ERIE RAILROAD COMPANY *et al.*, Defendants. } In Equity.

2 The bill of complaint in this cause was filed in the clerk's office on the eighth day of July, A. D. 1880, and was duly entered at the May term of this court, A. D. 1880, and is in the words and figures following:

Bill of Complaint. [*Filed July* 8, 1880.]

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

WILLIAM F. GRAHAM

v.

BOSTON, HARTFORD & ERIE RAILROAD COMPANY, ROBERT H. BERDELL, JOHN C. BANCROFT DAVIS, HENRY N. FARWELL, THOMAS TALBOT, MOSES KIMBALL, AVERY PLUMER, WILLIAM T. HART, CHARLES P. CLARK, FREDERICK A. LANE, GEORGE ELLIS, W. C. EAYRS, NEW YORK & NEW ENGLAND RAILROAD COMPANY; and CHARLES S. BRADLEY, CHARLES R. CHAPMAN and GEORGE M. BARNARD, as Assignees in Bankruptcy of the said Boston, Hartford & Erie Railroad Company; and CHARLES ENDICOTT, of Canton in said district, as he is Treasurer and Receiver-General of the Commonwealth of Massachusetts, charged with certain functions and entrusted with certain powers, and the custodian, under the laws of said Commonwealth, of certain papers, stocks, bonds and property involved in and pertaining to the subject matter of this bill of complaint; and CHARLES E. GREGORY, DAVID H. GREGORY and DUDLEY S. GREGORY, 3d, all of Trenton, N. J., executors of the will of Dudley S. Gregory, of said Trenton, N. J., deceased; EMILY W. HEALEY and MARY ANN W. HEALEY, both of Lynn in the State of Massachusetts, as they are executrixes of the will of Mark Healey, of said Lynn, deceased; ROBERT OLYPHANT, of Trenton, New Jersey, executor of the will of ——— Olyphant, of New Jersey, deceased; and John Doe and Richard Roe, executors of the will or administrators of the estate of ——— Eldridge, of Boston, Massachusetts, deceased.

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Your orator, William F. Graham, of Ireland and Kingdom of Great Britain, an alien and subject of Great Britain, brings this his bill of complaint against the Boston, Hartford & Erie Railroad Company, Robert H. Berdell, John C. Bancroft Davis, Henry N. Farwell, Thomas Talbot, Moses Kimball, Avery Plumer, William T. Hart, Charles P. Clark, Frederick A. Lane, George Ellis, W. C. Eayrs, the New York & New England Railroad Company; and Charles S. Bradley, Charles R. Chapman and George M. Barnard, as assignees in bankruptcy of the said Boston, Hartford & Erie Railroad Company, the defendants herein; and Charles Endicott, of Canton in said district, as he is Treasurer and Receiver-General of the Commonwealth of Massachusetts, charged with certain functions and entrusted with certain powers, and the custodian, under the laws of said commonwealth, of certain papers, stocks, bonds and property involved in and pertaining to the subject matter of this bill of complaint; and Charles E. Gregory, David H. Gregory and Dudley S. Gregory, 3d, all of Trenton, N. J., executors of the will of Dudley S. Gregory, of said Trenton, N. J., deceased; Emily W. Healey and Mary Ann W. Healey, both of Lynn in the State of Massachusetts, as they are executrixes of the will of Mark Healey, of said Lynn, deceased; Robert Olyphant, of Trenton, New Jersey, executor of the will of ——— Olyphant, of New Jersey, deceased; and John Doe and Richard Roe, executors of the will or administrators of the estate of ——— Eldridge, of Boston, Massachusetts, deceased; and thereupon your orator complains and says,—

That your orator is, and at the several times hereinafter mentioned was, an alien, and resident of Inniskillen in Ireland, and a subject of the Kingdom of Great Britain and Ireland.

That the respondents Robert H. Berdell, John C. Bancroft Davis and Frederick A. Lane are citizens of the State of New York, and George Ellis is a citizen of Connecticut. That the respondents Henry N. Farwell, Thomas Talbot, Moses Kimball, Avery Plumer, William T. Hart, Charles P. Clark, W. C. Eayrs, George M. Barnard, assignee, Charles Endicott, Emily W. Healey and Mary Ann Healey, are citizens of the State of Massachusetts. That the respondent Charles R. Chapman, assignee, is a citizen of the State of Connecticut. And the respondent Charles S. Bradley, assignee, is a citizen of the State of Rhode Island. And Charles E. Gregory, David Gregory, Dudley S. Gregory and Robert Olyphant are citizens of the State of New Jersey.

That the respondent the Boston, Hartford & Erie Railroad Company is a corporation incorporated as a distinct corporation in each, by and

under the laws of the States of Connecticut, Rhode Island and Massachusetts, respectively.

That the respondent the New York and New England Railroad Company claims to be a corporation created by and under the laws of the several States of Massachusetts, Rhode Island, Connecticut and New York, respectively.

That your orator is, and for several years last past has been, a stockholder of the Boston, Hartford & Erie Railroad Company, owning five hundred shares of the stock of said company, which stock stands on the books of said corporation in his name; and your orator brings this bill in behalf not only of himself, but every stockholder and creditor in said Boston, Hartford & Erie Railroad Company who may see fit to join therein and contribute to the expense thereof.

Your orator further avers of his own knowledge, that before the filing of this bill, he requested of and demanded from the president and directors of respondent the Boston, Hartford & Erie Railroad Company that they should bring a suit or take such legal proceedings as were necessary for the purpose of securing to said Boston, Hartford & Erie Railroad Company and its stockholders and creditors the redress and relief which your orator seeks in this bill, or such other relief as they may be advised; but that said president and directors have hitherto neglected and refused. and still neglect and refuse, to bring such suit, or take any legal proceedings therefor; and that your orator and other stockholders and the creditors of said Boston, Hartford & Erie Railroad Company are therefore unable to secure sheir rights in the premises as hereinafter set forth.

Your orator is informed and believes, and therefore avers, that the Legislature of the State of Connecticut, at its May session A.D. 1863, created and chartered a corporation by the name of the Boston, Hartford & Erie Railroad Company, a copy of which act of incorporation your orator begs leave to produce at the hearing of this his bill; that said company was lawfully organized under said act; that thereafter acts were passed by the Legislatures of the States of Massachusetts and Rhode Island, making the said corporation a corporation of those states, respectively, copies whereof your orator begs leave to produce at the hearing hereof, and had a corporate existence in, and as such corporations became the lawful owner of, railway franchises, railways, rolling stock and other property, real and personal, in each of the states of Connecticut, Massachusett and Rhode Island, prior to, and held title to the same, when it made or assumed the mortgages hereafter set forth.

Your orator is further informed and believes, and therefore avers, that said Boston, Hartford & Erie Railroad Company, under authority

conferred in the several acts hereinbefore referred to, on or about the first day of August, 1863, purchased and obtained legal title to all the franchises and property of the Southern Midland Railroad Company, it being a corporation created by the Legislature of the State of Massachusetts, and having grants of power from the Legislature of Connecticut to enable it to build and operate its railroad in said Connecticut, and a branch road from East Thompson in Connecticut, to Southbridge in Massachusetts, and one from Dedham to its main line, all in Massachusetts, with certain rolling stock and other property, subject to certain mortgages.

Your orator is informed and believes, and therefore avers, that, prior to said purchase of said franchise and property of said Southern Midland by said Boston, Hartford & Erie Railroad Company, a portion of the railway so purchased, to wit, extending from Dedham to Blackstone, and all in said Massachusetts, had been the property of the Norfolk County Railroad Company, a railroad corporation created by and existing under the laws of said State of Massachusetts; and that said Norfolk County Railroad Company, while so the owner of the last-described line of railroad, and the franchise under and by virtue of which the same was built and operated, did make, execute and deliver a lawful and valid mortgage of all its said franchise and property to trustees, to secure the payment of the principal and interest to be due and payable on certain bonds to be by it made and sold; and that under said mortgage, said Norfolk County Railroad Company did create and sell a large amount of its said mortgage bonds; and that at the time of the sale and conveyance by said Southern Midland Railroad Company of the said franchise and property to said Boston, Hartford & Erie Railroad Company, said mortgage of said Norfolk County Railroad Company was a good and subsisting mortgage, resting on the franchise and property as aforesaid; and that after said mortgage by said Norfolk County Railroad Company, said company consolidated or merged its franchises and property with other railroad corporations in due form and by certain provisions of law, and formed a new corporation under the name of the Boston & New York Central Railroad Company, a corporation incorporated under the laws of the States of Massachusetts, Connecticut and New York, respectively; said new company thereafterwards owned franchises for the construction of, and had railway lines running from, Summer street in Boston, to Mechanicsville in Connecticut; and branch lines from East Thompson in Connecticut, to Southbridge in Massachusetts; and from Dedham to the main line of road, together with a large amount of real and personal property.

That said Boston & New York Central Railroad Company, while so owner of said last-named franchises and property, did make, execute

and deliver to trustees a valid and lawful mortgage of all its said franchises and property, to secure the payment of the principal and interest to be due on certain bonds made under and secured by said mortgage; and that said last-named railroad company did issue a large amount of its bonds secured by said mortgage, and sell the same; and that at the time of the sale and conveyance of said franchises and property by said Southern Midland to said Boston, Hartford & Erie Railroad Company, as herein set forth, said last-named mortgage was a good, valid and subsisting mortgage, resting on the franchises and property included herein, as aforesaid.

Your orator is informed further and believes, and therefore avers, that after the making said mortgage by said Boston & New York Central Railroad Company, said company sold and conveyed all its franchises and property as by law it was empowered to do, and thereafter said Southern Midland Railroad Company became the lawful owner of the same, as it had power and authority by law to do, prior to the sale and conveyance to said Boston, Hartford & Erie Railroad Company as aforesaid, in August A. D. 1863; and that said Southern Midland Railroad Company, after it became the owner of the franchises and property of the said Boston & New York Central Railroad Company, to wit, on or about the thirtieth day of May, A. D. 1863, did make, execute and deliver to trustees a lawful and valid mortgage of all its franchises and property, to secure the payment of the principal and interest to be due on certain bonds to be made by it; and that under said last-named mortgage, said Southern Midland Railroad Company did create and sell a large amount of its bonds secured thereby; and that at the time of the sale and conveyance by said Southern Midland to said Boston, Hartford & Erie Railroad Company of its said franchises and property as aforesaid, said mortgage of said Southern Midland Railroad Company was a good and subsisting mortgage.

Your orator is further informed and believes, and therefore avers, that said Boston, Hartford & Erie Railroad Company, prior to the second day of February, 1864, obtained good and valid title in law, subject to sundry mortgages, of all the franchises and estates by it conveyed in mortgage to the treasurer of the State of Connecticut, as trustee, as hereinafter described.

Your orator is further informed and believes, and therefore avers, that said Boston, Hartford & Erie Railroad Company, under the authority contained in several acts above referred to, and acts of the Legislature of the State of New York, to which your orator prays leave to refer on the hearing hereof, on or about November 23, 1863, by a certain contract hereinafter referred to, a copy of which your orator begs leave to produce at the hearing hereof, obtained good and

lawful title to the franchises and all the properties of the Hartford, Providence & Fishkill Railroad Company, the same being a corporation created and exisiting under the laws of the States of New York, Rhode Island and Connecticut, said property being, in part, a constructed and running railroad, extending from Providence in said Rhode Island, to Waterbury in Connecticut, and the right to build and operate its railroad from said Providence to the line of the State of New York west from said Waterbury; such acquired rights being subject to certain mortgages hereinafter set forth, and to any valid liens on said property and contracts of said Hartford, Providence & Fishkill Railroad Company, and to the laws of the State of Rhode Island in that case made and provided, which your orator craves leave to produce on the hearing hereof. That prior to November, 1863, said Hartford, Providence & Fishkill Railroad Company had made lawful mortgages of all of its franchises and property in Connecticut to trustees, to secure its bonds issued and to be issued under and secured by said mortgage to an amount, principal sum, of $2,055,000; and that said mortgage was a valid and subsisting mortgage to secure said amount of bonds so issued under and secured by said mortgage.

And your orator is further informed and believes, and therefore avers, that the said Boston, Hartford & Erie Railroad Company, on or about the second day of February, 1864, made to the treasurer of the State of Connecticut as trustee, and to his successors in such office as such treasurer, a lawful mortgage of all its franchises, railways and property, with rolling stock and other property, real and personal, in each of the said States of Massachusetts, Rhode Island, Connecticut and New York, to secure the payment of $4,500,000, which represented the principal and interest to be due on certain bonds to be issued under and secured by said mortgage.

Your orator is informed and believes, and therefore avers, that on the sixteenth day of December A. D. 1864, there existed a corporation created by the Legislatures of the States of Connecticut, Rhode Island and Massachusetts, by the name of the New York & Boston Railroad Company, and empowered to construct a railroad from Boston, through Massachusetts and Rhode Island, and to New Haven in Connecticut; and having a railroad constructed and running between Brookline in Massachusetts, and Woonsocket in Rhode Island, and also owning certain other real and personal property; that on said December 16, 1864, under lawful authority, said last-named corporation leased its franchises and railroad, and all its effects, to the Boston, Hartford & Erie Railroad for nine hundred and ninety-nine years; and that afterwards, on the same day, the then Boston, Hartford & Erie Railroad Company consolidated, merged and made joint stock of the franchises

and estates of said two corporations, under the name of the Boston, Hartford & Erie Railroad Company, and so became the Boston, Hartford & Erie Railroad Company, the respondent herein. That prior to said merger, said New York & Boston Railroad Company had made two valid and lawful mortgages to trustees of all its franchises, railway and property lying and being between said Boston and the line of the Norwich & Worcester Railroad in Connecticut, to secure the payment of the principal and interest to be due on certain bonds and mortgage notes issued and to be issued, and secured by said mortgages; and being so issued and secured, said last-named company had before said merger sold bonds and mortgage notes on which there then was on December 16, 1864, due and unpaid in principal and interest, more than one million and five hundred thousand dollars.

And so your orator informs your honors that the aggregate amount of the liens on property and franchises owned by said Boston, Hartford & Erie Railroad Company, as owner or lessee, and which were mortgaged and assumed by them before the mortgage known as the Berdell mortgage, hereinafter referred to, was executed, was as follows:—

The Southern Midland Railroad Company, . . .	$301,000
" Norfolk County, " " . . .	414,350
" Boston & New York Central Railroad Company, .	794,000
" Hartford, Providence & Fishkill Railroad Company,	2,055,000
" New York & Boston Railroad Company upon one mortgage, ...	345,600
and upon another, ...	1,287,700
" Charles River Branch Railroad Company, . .	37,000

and the mortgage to the treasurer of the State of Connecticut, by the Boston, Hartford & Erie Railroad Company, $4,500,000; making in aggregate the sum of $9,904,650, with accrued interest to that date to be added.

Your orator is further informed and believes, and therefore avers, that said Boston, Hartford & Erie Railroad Company struggled to complete its line of railway, and especially its line extending from Boston to the Hudson river, by means of its corporate stock and bonds issued under its said mortgage of February, 1864; but that in December, 1865, there remained of said line, unbuilt, the portion between Waterbury in the State of Connecticut, and Fishkill in the State of New York, a distance of about seventy-four miles; and also the portion in Connecticut, between Willimantic and Mechanicsville, a distance of about twenty-six miles; and that said company found itself unable with its then means to further complete its said road.

That as your orator is informed and believes, and therefore avers, on or about the fourteenth day of March, 1866, the said Boston, Hartford & Erie Railroad Company, it is claimed, resolved to make a mortgage upon their road and property, and to create, issue and dispose of certain bonds, to be secured by said mortgage, and payable in the city of New York on the first day of July, A. D. 1900, for one thousand dollars each, and not to exceed the amount of twenty million dollars in all, the said bonds to be issued for the purpose of providing for and retiring all the then existing mortgage debt and prior liens upon the road and property of the said Boston, Hartford & Erie Railroad Company, and to complete and equip said road; that afterwards the board of directors of said Boston, Hartford & Erie Railroad Company, acting under authority of said resolution, it is claimed, authorized the creation and issue of twenty thousand bonds of one thousand dollars each, in form as follows:—

No. $1000.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Know all men by these presents, that the Boston, Hartford & Erie Railroad Company acknowledges itself indebted unto Dudley S. Gregory, or bearer, in the sum of one thousand dollars, lawful money of the United States, which sum it promises to pay at its office or agency in the city of New York, on the first day of January in the year one thousand nine hundred, with interest at the rate of seven per centum per annum, payable semi-annually on the first of January and July in each year, on the presentation and delivery of the proper annexed interest warrants.

This bond is one of a series of twenty thousand bonds of even date herewith, issued for the purpose of paying the existing debt of the company, and of completing and equipping their road. The payment of the principal and interest hereof is secured by a mortgage of the railroad and franchises, furniture and equipment of this company, bearing date March 19 A.D. 1866, which has been made in trust to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees. Upon the failure to pay any one of the interest warrants hereto attached, upon due presentation on or after maturity, and offer to surrender the same, provided said default continue for the space of six months thereafter, this whole series of bonds, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgager and to the trustees, shall become due and payable.

This bond is convertible at the option of the holder, being then the holder thereof, into the common capital stock of the company, and upon the surrender of the same with the proper coupons annexed, the company agrees to issue a certificate or certificates of capital stock therefor, at par, at any time as authorized by law, when this bond will be cancelled.

In witness whereof, this company has caused its corporate seal to be hereto affixed, and this bond to be signed by its president and secretary.

President.
Secretary.

That each of the said interest warrants attached to said bonds was in the words and figures following; to wit,—

$35. BOSTON, HARTFORD AND ERIE RAILROAD COMPANY $35.

Will pay the bearer, thirty-five dollars, in the city of New York, on the first day of , 18 , for semi-annual interest on Bond No.

H. N. OTIS,
Sec'y.

That thereupon, afterwards, as hereinafter more particularly stated, the officers of the Boston, Hartford & Erie Railroad Company did cause to be prepared for issue all of said twenty thousand bonds. That it is claimed that in order to secure the payment of the said bonds, and interest warrants thereon, the officers of the said Boston, Hartford & Erie Railroad Company executed and delivered its certain mortgage or deed of trust to the respondents Robert H. Berdell, of Goshen in the State of New York, and John C. Bancroft Davis, and the said Dudley S. Gregory, since deceased, of Jersey City in the State of New Jersey, as trustees, wherein and whereby it granted, bargained, sold, aliened, released and confirmed unto the said trustees and the survivor of them, and to their successors and assigns, all and singular the railways of said Boston, Hartford & Erie Railroad Company, commencing at the foot of Summer street in Boston in the State of Massachusetts, and running to Willimantic in the State of Connecticut, through Thompson in said Connecticut; and commencing at Providence in the State of Rhode Island and running to said Willimantic; and also commencing on the southerly side of said city of Boston, and running through Woonsocket in said Rhode Island to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York, to the western terminus of the location of the railway of said company on the east bank of the Hudson river at Fishkill; also running from said Willimantic to the city of New Haven in Connecticut; also from a point in said railway in said Thompson to South-

bridge in the State of Massachusetts, as said railways were then or should be located, constructed or improved, under or by virtue of any powers then granted, or that might thereafter be granted or obtained, to locate, construct or use a railroad on any of said indicated lines, with all the lands that were included or might be included in the location of said railway, or acquired for the use of said company within the terminal points aforesaid, but not including the lands at the termini at Boston and Fishkill which were outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters; also all the like estate, roads, railroads and structures, and matters and things pertaining or belonging thereto, that might be thereafter acquired or constructed, or belong to or be controlled by it, the said Boston, Hartford & Erie Railroad Company, together with the tools; income, issues and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of its road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the other machinery, and the coal, wood and other fuel belonging or appertaining to said railroad, or that might at any time thereafter belong or appertain to the same, as it might be changed by use and new acquisitions; also all the estates, real, personal and mixed, of any of the foregoing descriptions, or of any other kind that might be thereafter acquired by said Boston, Hartford & Erie Railroad Company, and used or intended to be used in the construction and operation of said railroad.

That a copy of said mortgage is hereto annexed, marked "Exhibit A," and made a part of this bill.

And your orator is informed and believes, and therefore avers, that said mortgage was made and authorized at a meeting of the stockholders in the city of New York, in pursuance of some notice, the particulars of which your orator is ignorant, in the office of the Erie Railroad, a corporation duly established in the State of New York, and whereof Robert H. Berdell, one of the trustees herein named, was president; that said Boston, Hartford & Erie Railroad was not a corporation of the State of New York, but a corporation created by the statutes of Connecticut, Massachusetts and Rhode Island, and said meeting ought to have been held in one or all of said states, and not in the State of New York.

And your orator is informed and believes, and therefore avers, that said meeting was held in the State of New York, beyond the states in which said corporation was created, so that as few stockholders as

possible, because of the distance from their homes, might attend said meeting, in order that the stockholders present representing or acting in the interest of the Erie Railway, might, by authorizing a mortgage of its franchises, raise a large sum of money, a portion of which should afterwards be diverted to the use of said Erie Railway; which was done, as is hereinafter fully set forth, to the extent of five millions of dollars. And your orator claims that by reason of the meeting being so held for the purposes aforesaid, and in the place aforesaid, said meeting was illegal, and all its acts and doings were null and void.

And your orator is informed and believes, and further avers, that after the execution of said mortgage of March 19, 1866, which has hitherto been known as the Berdell mortgage, and to which your orator will hereinafter refer as the Berdell mortgage, the said Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, the trustees therein named, accepted the trust imposed upon them in and by said mortgage, and entered upon the discharge of their duties thereunder. That thereafter, and on or about the 28th day of February, 1867, the said Robert H. Berdell, by an instrument in writing of that date, by him signed and delivered to his said associate trustees, Gregory and Davis, attempted to resign his place as trustee under said mortgage; and that the instrument in writing by which the said Berdell pretended and attempted to resign said trusteeship, was in words and figures as follows:—

OFFICE OF THE ERIE RAILWAY COMPANY,
NEW YORK, February 27, 1867.

To whom it may concern:

I hereby resign my position as trustee under the mortgage of the Boston, Hartford & Erie Railroad Company of date, March 19, 1866.

ROBERT H. BERDELL.

But the said pretended resignation was not accepted by a majority or any of the bondholders under said Berdell mortgage or said road, and no action of any court or judge thereof was had thereon. Nor did the said Berdell at any time render to any person, corporation or court any account of his acts and doings as such trustee, nor was he at any time relieved or discharged from the execution of the trust theretofore accepted and assumed by him under the said Berdell mortgage as aforesaid.

And your orator is informed and believes, and therefore avers, that thereafter, and on or about the twenty-eighth day of October, 1867, the said Dudley S. Gregory and the said John C. Bancroft Davis, trustees as aforesaid, illegally attempted and pretended to appoint one John S. Eldridge, then being the president and a director of the respond-

ent the Boston, Hartford & Erie Railroad, and a director and the president of the Erie Railway Company, a corporation created by and under the laws of the State of New York, who had and have a corporate existence and a board of officers distinct from and unconnected with any railroad situate in and incorporated by the laws of Connecticut, and whose line of road is and was situate entirely out of the State of Connecticut, as trustee with them under the said Berdell mortgage, in the place and stead of the said Robert H. Berdell; the said appointment of the said John S. Eldridge was never at any time ratified or confirmed by a majority or any of the bondholders under said mortgage or said road, or by any court.

That said John S. Eldridge thereupon unlawfully assumed to act as said trustee. That thereafter, and on or about the first day of December, 1868, the said Dudley S. Gregory and the said John C. Bancroft Davis, by an instrument in writing under their hands of that date, in the same words and figures, except the dates, as the pretended resignation of Berdell aforesaid, delivered to the said John S. Eldridge, attempted and pretended to resign their respective places as trustees under said B rdell mortgage.

That said pretended resignations were never, nor was either of them, delivered to, nor accepted by, a majority or any of the bondholders under the said Berdell mortgage, nor said road, nor by any court; nor did the said Davis and Gregory, or either of them, ever render to the said bondholders, or any of them, or to any other person or corporation or to any court, any account of their acts and doings as such trustees; nor were they, or either of them, ever relieved or discharged from the duties and obligations imposed upon them by their acceptance of the said trusts under said Berdell mortgage.

That the said John S. Eldridge continued to be the president and a director of the said Erie Railway Company until the thirtieth day of July, 1868, and continued to be the president and a director of the said Boston, Hartford & Erie Railroad Company until December, 1869; that thereafter, and on or about the sixteenth day of August, 1869, the said John S. Eldridge, unlawfully assuming to be the sole trustee under the said mortgage, attempted to appoint the respondent Henry N. Farwell, and Mark Healey, since deceased, trustees under the said Berdell mortgage, in the place and stead of said Dudley S. Gregory and John C. Bancroft Davis, whose places as such trustees he unlawfully and illegally assumed to be vacant; and your orator avers, upon information and belief, that said Farwell and Healey accepted said appointment, but declined to serve, and never did serve, as such pretended trustees, and did not, in fact, up to the time of their pretended resignation hereinafter referred to, so serve. That the said pretended appointments

last aforesaid were not made with the approval of a majority or any of the bondholders under the said Berdell mortgage or of said Boston, Hartford & Erie Railroad Company, nor by the direction nor under the approval of any court; that the said Farwell and the said Healey, at the time of their pretended appointments as trustees as aforesaid, were directors of the respondent the Boston, Hartford & Erie Railroad.

That on or about the sixteenth day of March, 1870, the said Healey and Farwell, respectively, induced thereto by the solicitations of the said Eldridge, did, for the purpose of covering up and concealing the fraudulent acts and doings of the said Eldridge hereinafter set forth, by an instrument in writing of that date, signed by them and delivered to the said John S. Eldridge, unlawfully attempt and pretend to resign the position of trustees under said Berdell mortgage; that neither the said Healey nor the said Farwell ever at any time rendered any account to any person, corporation or court, of any of their acts and doings, as pretended trustees during the time aforesaid.

That on or about the date last aforesaid, to wit, the sixteenth day of March, 1870, the said Eldridge, still unlawfully assuming to act as sole trustee under the said Berdell mortgage, unlawfully assumed and attempted, by an instrument in writing, signed by him, to appoint Thomas Talbot and Moses Kimball, respondents herein, trustees under said Berdell mortgage, to fill two vacancies unlawfully alleged by him to exist.

That afterwards, on or about the sixteenth day of March, 1870, the said John S. Eldridge, by an instrument in writing of that date, by him signed and delivered to the said pretended trustees Talbot and Kimball, attempted and pretended to resign his pretended trusteeship under said Berdell mortgage; the said pretended resignation was never delivered to, or accepted by, a majority or any of the bondholders under said Berdell mortgage, or by said stockholders of said road, or by any court; and on the twenty-fifth day of July, 1870, the said Talbot and Kimball, assuming and pretending to be the trustees under said Berdell mortgage, and to have the right and power to fill a vacancy that they illegally assumed to exist in the trusteeship thereof, pretended and assumed to appoint the respondent Avery Plumer to be a trustee under said Berdell mortgage. That such proceedings have been had in the actions brought by the respondent George Ellis, as hereinafter set forth, that the said respondents Talbot, Kimball and Plumer were declared, under the fraudulent and collusive decretal orders hereinafter mentioned, to be the trustees of the said mortgage; and that subsequently to the entry of the said decretal orders, or some of them, the said Talbot, Kimball and Plumer pretended and assumed to resign as trustees of the said Berdell mortgage, and to appoint as trustees

thereof the respondents William T. Hart and Charles P. Clark and George T. Olyphant aforesaid, deceased, who thereafter continued unlawfully to claim to be and act as the legal trustees under the said mortgage. And your orator is informed and believes, and therefore avers that the appointment of the said pretended trustees Eldridge, Talbot, Kimball and Plumer, and of each of them, was not made to or ratified or approved, nor were the pretended appointments of them, or either of them, made, ratified or confirmed, by a majority or any of the bondholders under the said Berdell mortgage, or by any court of competent jurisdiction, nor by the Boston, Hartford & Erie Railroad Company or the directors thereof, except as the same was pretended to have been made or recognized in the proceedings in said suits brought by said Ellis, as hereinafter stated; all of which is hereinafter more particularly set forth.

And your orator claims and insists that the said original trustees, Robert H. Berdell, John C. Bancroft Davis and Dudley S. Gregory could not finally determine their trust under said mortgage or deed of trust, and perfect their resignation, without the assent of the bondholders for whom they were trustees, and of the Boston, Hartford & Erie Railroad Company, or without the action of some court of competent jurisdiction in the premises; and that they, or the survivors of them, are and should be held to be the present continuing trustees under said mortgage, and amenable to all its responsibilities, and liable to all the duties therein mentioned, and bound to fulfill all the obligations therein and thereby originally assumed by them.

And your orator annexes a condensed schedule of the appointments, resignations and recording thereof of said several trustees, for convenience for reference, and prays that it may be taken as part of this bill.

And your orator further alleges on information and belief, that in the year 1873, and before the pretended organization of the Berdell bondholders into the New York & New England Railroad Company, as hereinafter more particularly set forth, the said Dudley S. Gregory, then being a citizen and resident of the State of New Jersey, departed this life.

And your orator further claims and insists that the attempted resignation of the said Berdell is pretended and is alleged to have been made to and accepted by the said Gregory and Davis, who have pretended and alleged that they appointed the said Eldridge as trustee under said Berdell mortgage in the place of said Berdell; and your orator alleges and claims that the said Gregory and Davis had no authority in law or under the provisions of the said Berdell mortgage to accept the

resignation of the said Berdell; that even if such resignation had been properly made and accepted, the said Gregory and Davis had no authority or power to appoint the said Eldridge as a trustee under said mortgage, for the reason that the said Eldridge was at that time the president of the said respondent the Boston, Hartford & Erie Railroad Company and the president of the Erie Railway Company, and continued as such president during the period heretofore in that behalf alleged, during all of which times he claimed to act as such trustee, and was incapacitated by the laws of the State of Connecticut, and by well-settled principles of law and equity applicable thereto, from being such trustee.

And your orator is informed and believes, and therefore avers, that said Berdell, Gregory and Davis well knew that the said Eldridge was incompetent and an unfit person to be or to act as trustee of the said Berdell mortgage, by reason of his being president of the said railroad company, and otherwise, and that their said pretended resignations without notice to, or the consent of, the Berdell bondholders and the Boston, Hartford & Erie Railroad Company, or the decree or order of a court of competent jurisdiction, was a fraud upon the said bondholders and the said company, and resulted in great injury to the said bondholders, and to your orator and other stockholders, and the creditors of said company, and in great loss and damage of and to the property covered by the said Berdell mortgage, and was an unlawful and inequitable attempt on their part to avoid and throw off the legal duties and responsibilities by them assumed in accepting the positions of trustees under said Berdell mortgage.

And your orator further charges and insists that under and by virtue of the terms of the said bond above mentioned, and of the mortgage given to secure the same, there were to be retained in the hands of said Berdell, Davis and Gregory, trustees as aforesaid, such amount of said bonds as should be equal to the whole amount of the bonds and mortgage notes outstanding from time to time, which then were liens upon any of the property or franchises by said mortgage to said Berdell, Davis and Gregory conveyed; and that the same were to be delivered to said railroad corporation only on the cancellation and return to them, the said trustees, of a corresponding amount of said outstanding bonds and mortgage notes, as by reference to said bonds and mortgage will more fully and at large appear; and that said railroad company authorized that said bonds should be so placed in the hands of said trustees, to be used for taking up the unretired debt of nine millions nine hundred and four thousand dollars par value of the bonds aforesaid.

And your orator is informed and believes, and therefore avers, that

the said Berdell, Davis and Gregory, and the several persons who as aforesaid illegally assumed to act as trustees under said Berdell mortgage, have not used the said bonds to retire the then existing mortgage debt, as by the terms of said bonds required, nor held and retained said bonds for that purpose, but, as your orator believes, fraudulently and wrongfully permitted and allowed the said bonds to be used by the officers of said Boston, Hartford & Erie Railroad Company and other persons for other purposes, so that there is now outstanding over two million five hundred thousand dollars claimed to be a prior debt and liens on the property and franchises intended to be covered by the said mortgage to Berdell, Davis and Gregory, and which last-mentioned mortgage was intended as a first and only lien; and your orator avers that only a small portion of the said Berdell bonds, and of the proceeds of the entire issue of twenty millions thereof, have been used in completing or equipping said road, and, except the portion used in retiring some of the underlying liens, the remainder of the said bonds, and the proceeds thereof, have been used wrongfully, and for other purposes not contemplated or sanctioned by the stockholders of said Boston, Hartford & Erie Railroad Company, and in violation of the terms of said mortgage.

And your orator shows that by section six of said Berdell mortgage, it is provided as follows; to wit, "That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of said trustees, whose assent, in writing, shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales."

And your orator claims that said section was made one of the express conditions of said mortgage, and gave to said trustees exclusively the absolute control of the expenditures of money derived from said bonds, and enjoined the duty of such supervision of such bonds, and the money derived from the same upon said trustees; and that it was their duty to see that such money was used in the building the railroad of the respondent the Boston, Hartford & Erie Railroad Company, and the equipment of the same, the purchase of the underlying liens, and for no other purpose whatever, and that the money so derived could not be used for any purpose, except on the written assent of one of the trustees; and your orator is further informed and believes, and therefore avers, that all said trustees and pretended trustees, from that time to the disposition of all said bonds and money derived from the same, neglected their duty in this, that no one ever supervised any expenditures or use of any money derived from said bonds, or gave written assent to any contracts; and all such money, or the greater part

thereof, derived from the sale of said Berdell bonds, and large amounts of said bonds themselves, were used for purposes other than those contemplated in or authorized by said mortgage deed.

And your orator avers that, subsequently to the execution and delivery of the said Berdell mortgage, the said Boston, Hartford & Erie Railroad Company purchased and became possessed of large amounts of property, real, personal and mixed, including locomotives, engines, car supplies of all kinds, and various property used in and about the running and using of the several aforesaid lines, and sundry pieces of land and real property held, occupied and used.

A more particular description cannot be given by your orator, because he is ignorant of the particulars thereof, and seeks to be informed of the same.

And your orator is informed and believes, and therefore avers, that the said Berdell mortgage, if authorized and executed in accordance with law, became and was the first and only lien upon all the property and franchises of the said the Boston, Hartford & Erie Railroad Company, acquired and owned by it at the time of the making of the said mortgage, or subsequently acquired and owned, subject only to the rights of such of the holders of the outstanding bonds secured by mortgages made prior to the said Berdell mortgage as hereinbefore set forth, that may be actually in the hands of *bona fide* holders, for value thereof.

And your orator upon information and belief further avers, that on or about the fifteenth day of July, 1870, Frederick A. Lane, then a director and counsel of the Erie Railway and representing and a holder of a very considerable sum of Berdell bonds in his own right, the amount thereof being to complainant unknown, and with the intent and purpose to get control of said Boston, Hartford & Erie Railroad, as an adjunct to, and a feeder of, said Erie Railway, by embarrassing said Boston, Hartford & Erie Railroad by a suit for foreclosure of said Berdell mortgage, and with the purpose of having said road put in the hands of receivers whom said Lane hoped might be appointed favorable to himself and his designs, caused one George Ellis, his confidential clerk, to bring a suit in equity in the Supreme Judicial Court of Massachusetts, sitting in and for the County of Suffolk, against said Boston, Hartford & Erie Railroad, and other parties in said bill named, charging that said Boston, Hartford & Erie Railroad had become default in the payment of the interest on said bonds, and asking for the appointment of a receiver of said road ; all of which will appear more at large in said bill, and proceedings thereon, a copy of which your orator begs leave to produce at the hearing hereof, and to refer to as part of this bill.

And your orator upon information and belief further avers, that such proceedings were had thereon, that on the second day of August, 1870, George Talbot Olyphant, George M. Bartholomew, of Connecticut, and J. Graham Gardiner, of the State of New York, were appointed receivers of said railroad; and said receivers took possession of said road and obtained leave of said Court to make certain liens thereon and raise money toward completing and equipping said road and paying their expenses, and otherwise to carry on and conduct said road as such receivers; but said receivers were interested with said Lane; and thereafterwards, while said suit of Ellis was pending, so brought as aforesaid, said Lane procured the proxies of a large number of stockholders of said Boston, Hartford & Erie Railroad, and with other stockholders of said road, who acted with him, at a meeting of the stockholders duly held for that purpose, caused said Eldridge to be displaced as president of said road, and said Lane to be elected as president in his stead, with a board of directors friendly to his designs who would and did co-operate with said Lane.

And your orator upon information and belief further avers, that said Lane, then representing said Boston, Hartford & Erie Railroad, the defendants in said suit, and having control of said Ellis, his clerk, became *dominus litus* in said suit, and became desirous that said receivers should be discharged. Whereupon said Lane, acting as aforesaid, agreed with the said Charles P. Clark, who had been acting as clerk to the said receivers, and said Hart and Olyphant and others who were desirous of getting possession of said road.

And your orator further shows, that joined with the said George Ellis as parties plaintiff in the suit brought in the State of Massachusetts at the commencement of said suit, were Matthew Bolles and Michael C. Bolles; and that subsequently James C. Ayer, since deceased, became joined as a party plaintiff in the said action; but whether or not the said persons other than the said Ellis were *bona fide* holders of bonds under the said Berdell mortgage, your orator is ignorant and unable to state.

But your orator is informed and believes, and therefore avers, that notwithstanding the joining of other persons with the said George Ellis as parties plaintiff, that the said action was, in fact, conducted by the said Ellis, acting for said Frederick A. Lane, who was at that time president of the said Boston, Hartford & Erie Railroad Company, and in accordance with his views and purposes; and that the said parties plaintiff to the said suit permitted themselves to be controlled and directed in the management thereof by the said Ellis, acting in manner aforesaid.

And your orator is informed and believes, and therefore avers,

that the said George Ellis was not a *bona fide* holder of any bonds of the Boston, Hartford & Erie Railroad, secured by the said mortgage, as alleged in his bill of complaint; that he never paid any sum whatever for the said bonds claimed to be owned by him; that he never had possession and control of the bonds so claimed to be owned by him as his own; and that in fact and in truth he was a clerk in the office of the said Frederick A. Lane, the then president of the said Boston, Hartford & Erie Railroad, and one of the respondents hereto, who in confederation with said Ellis, and to carry out his the said Lane's purposes as before stated, had employed said Ellis clerk in his office, to prosecute and direct said suit collusively in the interest of said Lane and his confederates, and in all things in the conduct of said suit, carried on, as aforesaid, in Massachusetts, was directed by and subject to the views, plans and purposes of the said Lane, who, with his confederates, was the real party in interest in said proceeding; the name of the said Ellis being used by them as a cover and as that of a nominal plaintiff; and that the said George Ellis so acted from the commencement of the said suit in all things as hereinafter alleged, and acted in furtherance of the designs of said Lane and others, his confederates, who was, during all the proceedings in said suit and in procuring all the interlocutory decrees and orders made in said suit, *dominus litus*, as well plaintiff as defendant, thereby deceiving said Court, in fraud of the rights of the other parties in interest, creditors and stockholders aforesaid, and caused and procured decisions and opinions of said Court upon moot questions only; each and all of whom, when disclosed, your orator prays may be made parties defendant to this bill.

And your orator is informed and believes, and therefore avers, that it was no part of the relief demanded in the said bill of complaint of the said Ellis, that the said Supreme Judicial Court of Massachusetts should decide and determine who were the trustees of the said Berdell mortgage, but that the relief therein asked for, and specifically prayed for, was a foreclosure, and none other, of the said Berdell mortgage, by sale of all the property covered thereby, and the appointment of receivers to take charge of the property *pendente lite;* but notwithstanding the failure to pray for such relief in the said bill, by collusion and preconcerted arrangement between the pretended parties to the said action, and in pursuance of a collusive and fraudulent agreement between the said Ellis and the other parties to the said action, and the said Frederick A. Lane, respondent hereto, who was then the president of the defendant the Boston, Hartford & Erie Railroad Company, and representing said road in said suit, the said cause was pretended to be submitted to the said Supreme Judicial Court of Massachusetts upon

the said bill, answers, and a certain agreed statement of facts. That your orator is informed and believes, and therefore avers, that in certain important and controlling particulars the said agreed statement of facts was not true, and stated certain matters as true that did not in fact exist, and omitted to state facts necessary for the proper determination of the questions submitted, which were well known to said Lane and his confederates. And that thereupon the said Court on the twenty-fourth day of April, 1871, without argument on the part of any of the parties to the said action, and by the consent of all the parties thereto, and being imposed upon in manner aforesaid, and to the great damage of your orator and other stockholders of the Boston, Hartford & Erie Railroad Company, made a decretal order by which the said respondents Kimball, Talbot and Plumer were declared to be and apparently adjudged to be the lawful trustees under the Berdell mortgage, and that the said trustees should have the right, power and authority to take possession of all the property of the said Boston, Hartford & Erie Railroad Company, upon paying certain sums, and making certain arrangements with the said receivers, who by a former order had been appointed in the said Ellis suit.

That thereafterwards, and without permission thereto of any court having competent jurisdiction, and without notice to said Berdell bondholders, the confederates aforesaid, or some of them, in furtherance of said conspiracy, procured, or caused to be procured, the pretended resignations of said Talbot, Kimball and Plumer, and the pretended appointment by them of the said respondents Hart and Clark, and of said Olyphant, since deceased, as aforesaid.

And your orator is informed and believes, and therefore avers, that said suit in equity in Massachusetts has never proceeded to final determination and decree by said Court, and is now pending therein, so that no final adjudication has been made of the pretended rights of the parties thereto.

And your orator is informed and believes, and therefore avers, that the said George Ellis, acting for and in behalf of the said Frederick A. Lane and his associate conspirators, and in manner and for the purposes aforesaid, and in furtherance of said conspiracy as aforesaid, and not otherwise, at the time of the commencing the said suit in the State of Massachusetts, began, as sole plaintiff, suits in equity in the Superior Court of the State of Connecticut, and the Supreme Courts of Rhode Island and New York, respectively, in which the same persons were appointed receivers of the said respondent the Boston, Hartford & Erie Railroad Company, as in the State of Massachusetts had been appointed such receivers; and that the said actions in said states, other than the State of Massachusetts, were being conducted for the

same purpose and with a like prayer in the bills of complaint therein, that the said property of the Boston, Hartford & Erie Railroad Company should be foreclosed and sold.

And your orator is informed and believes, and therefore avers, that in the States of Connecticut and Rhode Island, in pursuance of the said preconcerted, collusive and fraudulent arrangement made and entered into between the said Frederick A. Lane and others, as aforesaid, in pursuance whereof the said actions were brought and maintained, in the name of the said George Ellis as aforesaid, agreed statements of facts were prepared and signed by the attorneys for all the parties appearing in said actions, which agreed statements of facts were substantially the same as that submitted to the Supreme Judicial Court of Massachusetts, and were untrue and incomplete as aforesaid, and that the courts in which the said actions were pending, imposed upon by the said fraudulent arrangement by the parties thereto, made and signed decretal orders appointing and recognizing the said Kimball, Talbot and Plumer as trustees of the said Berdell mortgage, which decretal orders were drawn, prepared and consented to by the counsel representing said several parties, but in truth and in fact upon the procurement of said Ellis, and for the purpose aforesaid; and that in the State of New York, the action brought by the said Ellis was discontinued, on the consent of all the parties thereto, on the 16th of January, 1871, by an order made and entered on that day by consent as aforesaid; and that on the 15th of August, 1871, upon the petition of the receivers of the said Boston, Hartford & Erie Railroad Company, without any notice to any of the parties to the said action, they were discharged from their trusts, and ordered to turn over all the property in their possession to the said Hart, Olyphant and Clark, the then pretended trustees of the Berdell mortgage, who had petitioned to be made parties to said suit; and that no other order or decree was ever entered in the State of New York, in the action brought by the said Ellis as aforesaid, referring in any manner to said pretended trustees.

And your orator further shows, that all of said matters, and other facts material to the questions herein to be determined, will more fully and at large appear, reference being had to the records and decrees made in said several actions brought by the said George Ellis, copies of all which records, decrees and proceedings your orator prays leave to produce at the hearing of this bill.

That on or about the 15th day of August, 1871, the said Hart, Olyphant and Clark, having become trustees as aforesaid, obtained possession of all the property, real, personal and mixed, of the Boston, Hartford & Erie Railroad, and entered upon their pretended duties of trustees under the Berdell mortgage, running the roads, managing and

operating the property secured by the said mortgage, taking and applying the income and the tolls of said road and of all its property, in such manner as to them seemed fit.

All of which acts and doings of the said Hart, Clark and Olyphant were in pursuance of the confederation and conspiracy aforesaid, and in violation of the rights of the Boston, Hartford & Erie Railroad Company, and its stockholders and creditors.

And your orator is informed and believes, and therefore avers, that the said Hart, Clark, Lane and others, confederates in the aforesaid conspiracy, conspiring and colluding against the interests of your orator and others, the stockholders of the Boston, Hartford & Erie Railroad, and the bondholders under said Berdell mortgage and the said company, for the purpose of obtaining possession of said Boston, Hartford & Erie Railroad Company, and its franchises, goods and estate, so mismanaged the affairs of said railroad company while officers, or acting or pretending to act as trustees under said Berdell mortgage, as to permit a default in the payment of the interest upon said Berdell mortgage bonds, so that the possession of the road, with its property, franchises, &c., could be taken and appropriated by them to their own use and gain, and that of others, their confederates.

Your orator is further informed and believes, and therefore avers, that on the 16th day of September A. D. 1871, said pretended trustees, Hart, Olyphant and Clark, with the design and for the purpose aforesaid, did file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, New York and Connecticut, a written notice, by them as trustees, signed and acknowledged before a notary public, that they had taken possession of said mortgaged franchises and estates, under the provisions of said Berdell mortgage, for default in the payment of interest on said Berdell bonds, to the intent and with the purpose of foreclosing said mortgage.

And your orator claims that in said Berdell mortgage it is provided that if default in payment of interest continue for eighteen months after filing notice as aforesaid, the whole of the mortgaged premises and franchises named in said mortgage shall vest absolutely and in fee in the parties of the second part thereto, to wit, the trustees under the same, without further assurance, and without further process of law, and all right or equity of redemption by said railroad company, maker thereof, shall be forever barred and foreclosed, and that upon such foreclosure it shall be the duty of said trustees to call a meeting of the holders of the mortgage bonds secured by said mortgage, by an advertisement of the time and place and object thereof, at least three times a week for three successive weeks, in newspapers published, one in the city of Boston, one in the city of Providence, one in the city of Hart-

ford, one in the city of New York, and one in London in England; and the bondholders at such meeting may, at an election to be presided over by such of the trustees as may be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of said bonded debt held by him, choose from their number a board of directors of like number with the then board of said railroad company, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each; which said corporation shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions, of the Boston, Hartford & Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured by said Berdell mortgage, at the rate of ten shares for every bond of one thousand dollars, as said bonds shall be surrendered to said new corporation, to be exchanged for certificates of stock at the rate aforesaid; and that the trustees shall by deed convey to the new corporation all said mortgaged property, premises, estate and franchises, and all additions thereto; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation, and takes stock therefor on the terms aforesaid.

Your orator upon information and belief further avers, that the recitals contained in the notice annexed, and marked "Exhibit B," to the effect that the said Hart, Olyphant and Clark, "in pursuance of the decrees aforesaid," referring among other decrees, to an alleged decree of the State of New York, did file the notice on the 16th day of September, 1871, therein referred to, is untrue. No decree whatever was ever made or entered in the said action in the State of New York, as will fully appear by the record thereof, to which your orator craves leave to refer on the hearing of this bill, and no valid decree and adjudication of the said Courts of Rhode Island, Connecticut and Massachusetts were ever duly and properly made in that behalf.

Your orator further claims, that in and by said Berdell mortgage, it is provided in the words following, to wit: "That of the whole issue hereby authorized to be made of said bonds, there shall be retained in the hands of said parties of the second part such amount of said bonds and mortgage notes outstanding from time to time, which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part, only on the cancellation of a corresponding amount of said outstanding bonds or mortgage notes."

And your orator is further informed and believes, and therefore avers, that soon after the execution and delivery of said Berdell mortgage, said Berdell, Gregory and Davis, as trustees, and prior to the issue of

said Berdell bonds, did ascertain the amount of bonds and mortgage notes underlying said Berdell mortgage, and found the same, on or about March 6, 1867, to amount to over nine million dollars ($9,000,000). And your orator avers, that to the amount of such underlying bonds and notes, said Berdell bonds, if valid, were trust bonds in the hands of the trustees under said mortgage, to be delivered to said Boston, Hartford & Erie Railroad Company only upon the cancellation of a corresponding amount of said underlying bonds and notes.

And your orator is further informed and believes, and therefore avers, that on said 14th day of August A. D. 1869, there was, and there has remained due upon said bonds and notes underlying said Berdell mortgage as aforesaid, and not purchased or had by said railroad company, or said trustees, more than $2,500,000,—all of which was well known to said railroad company and trustees, and the several persons who have claimed to be trustees under said Berdell mortgage. And your orator is further informed and believes, and therefore avers, that on said 14th day of August A. D. 1869, there were in the possession of said Eldridge, who was then president of said company, and who claimed to be such trustee, twenty-five hundred of said Berdell bonds, wholly executed by said trustees Berdell, Davis and Gregory, but not signed by said railroad company, and sealed with its seal, known as and called reserved bonds for that they were considered by said railroad company as set apart to stand against said last-named underlying bonds and notes. And your orator is further informed and believes, and therefore avers, that the officers of said railroad company had, prior to said August 14, 1869, illegally issued and disposed of all of said twenty thousand bonds made and executed in part aforesaid, except said last-named twenty-five hundred, or the greatest portion thereof; and that afterwards the said officers of said railroad company, with the knowledge and consent of the trustees, and said pretended trustees, under said mortgage, did issue and dispose of the whole of the remainder of said twenty thousand bonds so executed as aforesaid, but not in exchange for said underlying bonds or notes; and your orator is informed and believes, and therefore avers, that the issue and disposal of said last-named twenty-five hundred bonds was against law, and that the purchasers of the same took and obtained no title to the same, and that whoever now holds any of the same has and possesses no right or title thereto. Your orator is not now able to give a description of said last-named twenty-five hundred bonds, but is informed and believes, and therefore avers, that they each and all had a number on the same by which they can be identified, and that the books of account and papers of said Boston, Hartford & Erie Railroad Company will show and disclose the same; and so, when your orator shall be enabled

to examine such books, he will, by means of the same and other testimony, be able to particularly show and prove the identity of said twenty-five hundred bonds so wrongfully and unlawfully issued and sold as aforesaid, and before then set apart and appropriated to the protection of said railroad company from said underlying bonds as aforesaid.

And your orator further, upon information and belief, avers that none of said twenty-five hundred Berdell bonds last named, and last issued and disposed of by said railroad company, are, or can be, held included in and among the bonds secured by and under said Berdell mortgage.

And your orator further alleges that, in addition to the said twenty-five hundred bonds, the said John S. Eldridge, who was at the time the president of the Boston, Hartford & Erie Railroad Company, and claimed to be the sole trustee under the said Berdell mortgage as aforesaid, had in his possession, or under his control, 4819 of said Berdell bonds, pretending they had been pledged for a loan at fifty per cent. of their par value, and that they were, on said 11th of November, 1869, and also in November, 1870, held under said pledge, together with 68,549 shares of the capital stock of said company, all of which said bonds and stock it is pretended were pledged by W. C. Eayrs as trustee, for $4,059,396. Said Eayrs was, during the periods before mentioned, a clerk of the said John S. Eldridge, and was wholly without means or responsibility; and in all said transactions was representing the said John S. Eldridge, and the said bonds professedly held by said Eayrs, were, in fact, held and controlled by said Eldridge; that said bonds were all fraudulently and illegally taken by said Eldridge, and without consideration appropriated to his own use, while he was the president of said Boston, Hartford & Erie Railroad Company, and claimed to act as the sole trustee under said Berdell mortgage as aforesaid.

And your orator, upon information and belief, further avers that said Eldridge and said Berdell, conspiring together to have said Eldridge appointed trustee under said Berdell mortgage, confederated and agreed together that, for the sum of ten thousand dollars ($10,000), to be thereafterwards paid to said Berdell by said Eldridge, said Berdell should resign his trust as such trustee, so that said Eldridge could succeed him, in said trust as hereinbefore set forth, and so that said Eldridge might get by his further action herein set forth, sole possession of said property, bonds and trusts. And after said Eldridge was appointed as said trustee in the place of said Berdell, in the manner aforesaid, in furtherance of said confederation, said Eldridge paid said Berdell ten thousand dollars ($10,000), by ordering the same to be paid by the financial agent of said Boston, Hartford & Erie Railroad, from its own

money, a portion of which had been raised; to a much greater amount than said ten thousand dollars ($10,000) by said Eldridge issuing and selling said Berdell bonds so held in trust.

And your orator upon information and belief further avers, that said John C. Bancroft Davis, one of said remaining trustees, having thereafterwards appointed said Eldridge, confederating and conspiring with said Eldridge to put all said bonds, trust property and trusts heretofore mentioned into the full power and control of said Eldridge, did attempt to resign his said trusts in manner aforesaid, said Davis receiving for said resignation, and in pursuance of said conspiracy, the sum of fifteen thousand dollars ($15,000) from the funds and money of said Boston, Hartford & Erie Railroad, so raised as aforesaid, and coming to said road through the agency of said Eldridge, in the manner aforesaid, so that said Eldridge might thereafterwards appoint such trustees as he saw fit, to aid him in the control of said trust bonds and property hereinbefore described.

And your orator further avers, that said Gregory did resign his said trust on the same day that said Davis resigned his said trust, as hereinbefore stated, so as to leave said Eldridge the sole trustee, and in sole charge of said bonds, trust property and trusts; but your orator is ignorant of the whole amount of the consideration which was paid to said Gregory for his said resignation, but is informed and believes that five thousand dollars ($5,000) was paid to said Gregory from the moneys of said Boston, Hartford & Erie Railroad, raised in the manner aforesaid by said Eldridge, on the same day said fifteen thousand dollars ($15,000) was paid to said Davis, to wit, on the 14th day of January, 1869, being less than thirty days after said resignations were made; and Eldridge was thereby put in sole possession of said bonds, trust property and trusts, which time was employed by said Eldridge in raising the money with which said Davis and Gregory were paid in the manner aforesaid, as is herein more fully set forth.

And your orator, upon information and belief further avers, that all said twenty thousand (20,000) bonds of one thousand dollars ($1,000) each were prepared for issue and signed by said Berdell, Davis and Gregory, as trustees, before said pretended resignation, and were placed, as well those that were held in trust to redeem the underlying liens upon said road, as those to be issued for the construction and equipment of said road in the sole possession of said Eldridge, president of said Boston, Hartford & Erie Railroad, as aforesaid, so that said bonds required only the signature of said Eldridge, as president, and the signature of the secretary of said company for the time being, to make them, if legally authorized, valid, binding bonds of said company in the hands of innocent third parties who might purchase the same.

And your orator upon information and belief further avers, that said Eldridge was wholly insolvent and irresponsible, and without means or property of his own, and that he soon thereafterwards died and his estate was settled in insolvency.

And your orator upon information and belief further avers, that said Eldridge, after he got possession of said bonds, so prepared and signed as aforesaid, issued the same in vast amount, the extent of which your orator is ignorant and cannot aver, and sold and disposed of them for all purposes, as well in part in accordance with the trust for completing and equipping said road, and in taking up the underlying liens, as for his own use and benefit; being thereto empowered by said Berdell, Gregory and Davis in manner aforesaid.

And your orator further avers upon information and belief, that none of the pretended trustees, or either of them, afterwards appointed or attempted to be appointed as hereinbefore set forth, ever signed any of his said bonds, or ever had any control or possession of said bonds, or interfered with the control of said bonds or other trust property.

And your orator further avers upon information and belief, that said Eldridge, having taken said bonds so prepared as aforesaid, into his own private possession, sold or disposed of them at his own pleasure, without the knowledge or assent of said Berdell bondholders who had before purchased others thereof, and without any direction or control of said Boston, Hartford & Erie Railroad, or the directors and officers thereof, other than himself, or said supposed trustees, thereafterwards by him appointed, in the manner aforesaid.

And your orator further avers and charges, that said Berdell, Davis and Gregory, by their untrustworthy, illegal and fraudulent confederation and acts aforesaid, did place and put the property, as well the bonds to be reserved in trust, as others, into the sole possession of said Eldridge, for the consideration before named, and for other considerations, of which your orator is ignorant and cannot aver; by which means a large portion of the bonds which ought to have been held and reserved in trust for the payment of the underlying liens on said road, as well as a large portion of the bonds which ought to have been devoted to the construction and equipment of said road, were wholly lost to said road, to your orator and the other stockholders and the creditors of said road, except one bond only, which, after the pretended insolvency of said Boston, Hartford & Erie Railroad, was found in the safe of the Boston, Hartford & Erie Railroad Company, unsold, instead of in the possession of either of the said trustees.

And your orator upon information and belief further avers, that said Healey and said Farwell, by holding themselves out as acting as

said trustees, shielded said Eldridge in his said acts by thus giving it to be understood by said bondholders of said road that said board of trustees was full and legally constituted, and their interests were being protected by disinterested and competent parties as against said Eldridge and the Boston, Hartford & Erie Railroad, the debtor, which Eldridge represented; and said Avery, Kimball and Talbot, by receiving and apparently acting under said illegal appointment as said trustees, and allowing themselves to be known as such, and by not entering into the duties of their trust, which they appeared to hold, and by not taking possession of the trust property and properly caring for the same, and holding the same for the purposes of the trust, and by permitting said Eldridge to squander and misuse the same, and by their position preventing inquiry and action on the part of said bondholders to protect their interests, wrought material injury to and inflicted great loss upon himself and said bondholders, and said Boston, Hartford & Erie Railroad, its stockholders and creditors.

And your orator upon information and belief further avers, that while said Ellis suit was pending, to wit, in October, 1870, and induced thereto by the proceedings threatened to be taken thereunder, one Adams claiming to be a creditor to a small amount, petitioned the District Court of the United States for the District of Massachusetts, that said Boston, Hartford & Erie Railroad Company might be declared bankrupt under the provisions of the bankrupt law of the United States then being, and that all the property, rights, franchises and privileges might thereunder, and by virtue of said proceedings in bankruptcy, pass to assignees thereafter to be chosen. And such further proceedings were had that on the 2d of March, 1871, an adjudication of involuntary bankruptcy was made, and a decree in due form of law by said district court, and Charles S. Bradley, George M. Barnard and Charles R. Chapman were appointed assignees; and by a duly executed deed of assignment all the property, franchises, rights and privileges of said Boston, Hartford & Erie Railroad Company were conveyed to said assignees.

And your orator upon information and belief further avers, that said road, and substantially all the property thereof, being then in possession of receivers under the suit of said Ellis, appointed as aforesaid, was not taken possession of by said assignees, or in any way interfered with by them, saving that thereafterwards, by a deed executed by said assignees for substantially a nominal consideration, they released all the rights of the Boston, Hartford & Erie Railroad in said property, or some portion thereof, to said Clark, Hart and Olyphant, said pretended trustees. But of the nature and contents of said deed or deeds, your orator is ignorant and cannot set out the same. He therefore

prays that when said deed is discovered and made known it may be adverted to, and made a part of this bill of complaint.

And your orator upon information and belief further avers, that said assignees never administered, dealt with or had control or possession of any of the property or franchises or rights of said road, except a small and nominal amount of property not claimed by said receivers or said supposed trustees, which had been claimed to be held by and included in the provisions and liens of said Berdell mortgage.

And your orator upon information and belief further avers, that said assignees did not demand or claim that said Berdell bonds, or any part thereof, which were or ought to have been remaining in the hands of said trustees, in trust for the purpose of taking up and cancelling said underlying liens, should be held, used and devoted to such purpose, or should be accounted for to them for such purpose, or that said trustees, or either of them, should account to said road or to said assignees for the breach of that trust, and for the disposal of said property in violation thereof.

And your orator claims and insists that said provision in said mortgage by which the bondholders were to be enabled to form and incorporate themselves into a company which should be a corporation with the franchises and powers of running a railroad in several different states, was beyond the powers of said Boston, Hartford & Erie Railroad, its stockholders or directors, and was illegal and void, and no action taken thereunder could be of any binding force or effect upon either the stockholders of said Boston, Hartford & Erie Railroad, or the holders of said bonds, or the creditors of said road, or were or are valid and subsisting obligations against said Boston, Hartford & Erie Railroad Company, and all action purporting to be under and by virtue of said provision is null and void, and ought to be held for naught.

And your orator upon information and belief further avers, that by the pledge and their disposal of said bonds so held by said railroad, and the officers of said road, very large amounts of money were raised and used by said Eldridge as trustee, and the officers of said road, not in constructing and equipping said road, not in cancelling said underlying liens and debts, but in purchasing in the market, at speculative prices, for the purpose of stock-jobbing and other irregular and unlawful transactions, the stock of said Boston, Hartford & Erie Railroad, by which very large amounts of money were lost to said road, and said bonds, and all the proceeds thereof, were wholly squandered, as by reference to the books of said Boston, Hartford & Erie Railroad will more fully and at large appear when the same can be inspected by your orator, and brought before this Honorable Court.

And your orator upon information and belief further avers, that notwithstanding the great loss, mismanagement and wrongs done and permitted as hereinbefore described and set forth, and the squandering and waste of the proceeds of said bonds, and the mismanagement of the property of said road by the officers thereof who were claiming to be trustees under said Berdell mortgage, said road with its connections, leases and assets was worth more than the true and just liens and claims upon it, and from its earnings was able and capable of paying the interest upon said Berdell bonds, had their assets been devoted to the finishing and equipping of said road by said trustees and officers.

And your orator upon information and belief further avers, that on or about October in the year 1867, said Eldridge, then being the president of the Boston, Hartford & Erie Railroad, and also president of the Erie Railway, and while said Davis and Gregory were trustees as aforesaid, and said Davis being the legal counsel and adviser of said Erie Railway, said parties colluded and agreed together as such trustees and the president of said Boston, Hartford & Erie Railroad, and as well of the Erie Railway, of which the majority of said trustees were counsel and president, and sold five millions of said bonds at a discount of twenty per cent., receiving therefor the promises to pay at future dates, the exact dates of which your orator is ignorant, but which will appear upon the books of said railroad, which were afterwards discounted at great loss and cost to said Boston, Hartford & Erie Railroad, in order to convert the same into cash, and the money obtained thereon was not used in equipping and finishing said road, nor in taking up the underlying liens on said road, but was used in paying the losses that said officers of said Boston, Hartford & Erie Railroad had made in speculations in stocks in the name of said road.

And your orator upon information and belief further avers, that said Erie Railway guaranteed the payment of the interest on the $5,000,000 of Berdell bonds, and sold and disposed of the same in buying certain property for said Erie Railway at ninety cents on the dollar for said bonds; and that this whole transaction, was made for the benefit of said Erie Railway in accordance with a contract made between the officers of the two roads, the said officers that made and concluded said transactions and contract being substantially one and the same persons.

And your orator prays that said contract with said Erie Railway, or any of said defendants, when discovered and produced, may be made a part of this his said bill of complaint.

And your orator is informed and believes, and therefore avers, that the directors of said Boston, Hartford & Erie Railroad, without the

consent of the stockholders thereof, and for the purpose of making a sale of said bonds for their own purposes and uses, and not for the use of said road, but for the purpose of getting money into their hands arising out of the sale and pledge of said bonds, applied to the State of Massachusetts for a loan of its scrip, payable in London in sterling to a large amount, to wit, the amount of four millions of dollars, in the manner and form as will more fully appear in the various public acts, resolves and doings of the public officers of the State of Massachusetts, which your orator will produce at the hearing upon this bill, and to which he prays leave to refer; and such proceedings were had that the scrip of the State of Massachusetts, to a great amount, to wit, to the amount of four millions, was at several times loaned to said road, and to the president and directors of said road upon the pledge and deposit with the Treasurer and Receiver-General of said Commonwealth, one of the respondents hereto, of a large amount, to wit, the amount of four millions of dollars, of said Berdell bonds, which said Berdell bonds were to be held as collateral security for the payment of said scrip issued by said state at the maturity thereof, to wit, in the year 1900; but said state required said road, as a part of the arrangement of such loan, to pay interest upon said scrip as the same should become due, and that a portion of the earnings of said road should be set apart to create a sinking fund from which said scrip should be paid at its maturity.

And your orator is informed and believes, and therefore avers, that said state, before it entered into said transaction, by proper committees of its legislature and its governor and council, made an investigation into the affairs of said company, in so far as to ascertain and learn the terms and conditions of said mortgage, and knew the fact that said mortage required a portion of said bonds, hereinbefore stated, equal to the underlying liens and mortgage upon said road, to be held and devoted to the payment thereof, and to no other purpose whatever; and said state, having learned of outstanding underlying liens upon said road, made it a condition precedent to delivering their scrip to said road that the underlying securities for such parts of the road as were within the State of Massachusetts, should be reduced to at least the sum of one million of dollars, which the state agreed might be left outstanding, but made no provision whatever for the payment or cancellation of the underlying liens of said road outside of the said State of Massachusetts.

And your orator is informed and believes, and therefore avers, that the State of Massachusetts, well knowing that a portion of said bonds were to be held in trust for the cancellation of the underlying liens and mortgages only, and being informed and having due notice that there

had been already issued at the time of the several loans of its scrip, and the receipt of the Berdell bonds as collateral thereto, so small an amount of Berdell bonds, that enough did not remain in possession of said road or said trustees to take up and cancel the underlying liens on said road, took such collateral security for their said scrip which were in possession of the officers of said road in the manner aforesaid, which they were informed and had notice were necessary, and required to take up and cancel said underlying liens, and were devoted thereto, to a great amount, to wit, the amount of four millions of dollars, and by so doing, your orator claims that the trust funds of said road devoted to another purpose were by said State of Massachusetts taken as collateral security for a loan of its credit, the proceeds of which were by the very terms of the loan not to be devoted to taking up the underlying liens and mortgages, and was therefore a diversion of the trust funds, made knowingly and willingly, which renders such deposit of all said bonds as collateral security, null and void; and that the same ought to be given up to be cancelled or returned to said Boston, Hartford & Erie Railroad, its creditors and stockholders, and your orator, or ought to be held by said state for the benefit of said creditors, stockholders and your orator.

And your orator is informed and believes, and therefore avers, that thereafterwards said bonds being held by said State of Massachusetts, as collateral security for the payment of their scrip at maturity, which would not mature until the year 1900, in violation of the rights of your orator, the creditors and bondholders of said road and said state, attempted and claimed by an act of its legislature, to alter and change the terms of the contract under which said bonds had become their sole property, and were no longer to be held by them as such collateral security; and that said state, by its own act, having become sole owner thereof, appeared as the owner of said bonds in a meeting at which said pretended corporation of the New York & New England Railroad Company was formed, as hereinafter set forth, and acted as the owner of said bonds, and voted upon them as the owner thereof by its agents and officers, which said amount of said bonds was illegally held by the State of Massachusetts, and so illegally used by the State of Massachusetts; constituting a large portion, to wit, more than three fifths, of the small minority of said bondholders, who claimed to act, and did act, in said meeting, in the organization of said pretended corporation and in choosing said Hart and Olyphant as directors, thereby, by means of the vote of said state, putting said Clark, Hart and Olyphant in possession of said road, and managers of said pretended corporation; all of which acts and doings your orator claims were illegal, void and against law and right, and all the acts and resolves of said legislature

which in any way altered, changed or modified the contract, under which said State of Massachusetts held said bonds are null and void, and in contravention of the Constitution of the United States.

And your orator upon information and belief further avers, that after said Hart, Clark and Olyphant claimed to be said pretended trustees in manner aforesaid, and after they had became purchasers and owners of a large amount of said Berdell bonds, each, respectively, and after being such trustees and owners at the same time, respectively, and after they had taken possession of said road, claiming to be such trustees under the terms of said Berdell mortgage, for foreclosure, and after the time when, by said terms of said mortgage, the foreclosure had become perfect, confederating and colluding with divers persons, to your orator unknown, to get possession of all said property, rights and franchises of said road, did obtain assignments and conveyances of all interest and right of said road, then claimed and supposed to be outstanding in said assignees; but what rights and franchises of such property they had so obtained, your orator is ignorant, but prays that the same may be discovered by said last-named defendants and said assignees.

And your orator upon information and belief further avers, that said Hart, Clark and Olyphant, and their confederates and associates aforesaid, in furtherance of said confederation and conspiracy, did cause a certain notice to be issued, in words and figures following; to wit,—

To the holders of the Bonds of the Boston, Hartford & Erie Railroad Company, known as "Berdell Bonds:"

Whereas the Boston, Hartford & Erie Railroad Company, on the nineteenth day of March A.D. eighteen hundred and sixty-six, did execute a mortgage to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, trustees, with provisions for the appointment of their successors, of its certain railroads, franchises and other property situated in the States of Massachusetts, Rhode Island, Connecticut and New York, and of property to be thereafter acquired, for the purpose of securing the bonds of said company the amount of twenty millions of dollars, as will more particularly appear by reference to said mortgage, which is recorded in the Registry of Deeds for the County of Suffolk in the commonwealth of Massachusetts, liber 884, folio 273; in the Registry of Deeds for the County of Norfolk in said commonwealth, liber 357, folio 191; in the Registry of Deeds for the County of Worcester in said commonwealth, book 752, page 1; and in the Registry of Deeds for the County of Middlesex (South District) in said commonwealth, book 1170, page 441; in the Clerk's office of

Dutchess County in the State of New York, liber 115 of Mortgages, page 82 to 94, inclusive; in the Clerk's office of Putnam County in said State of New York, in liber 34 of Mortgages, beginning on page 131; and also recorded in the office of the Secretaries of State of the States of Rhode Island and Connecticut:

And whereas the undersigned were, on the nineteenth day of July A. D. eighteen hundred and seventy-one, duly appointed the trustees under said mortgage, and have ever since continued to be the trustees thereunder, and as such trustees, in pursuance of the provisions of such mortgage, and under the authority of decrees of the Supreme Judicial Court of Massachusetts, the Supreme Court of Rhode Island, the Superior Court of Connecticut and the Supreme Court of New York, did, on the thirteenth day of September A. D. eighteen hundred and seventy-one, take possession of all and singular the railways, property, franchises and estate covered by said mortgage, for breach of the condition thereof, to wit, the non-payment of the interest upon the bonds secured by said mortgage, which default had continued for more than six months prior to the taking possession as aforesaid, and for the purpose of foreclosing said mortgage for said breach of condition; and did, in pursuance of the terms of said mortgage, and of the decrees aforesaid, on the sixteenth day of September A. D. eighteen hundred and seventy-one, file, in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a notary public, as is provided in said mortgage, that they had taken possession as aforesaid, for said default, and of their purpose to foreclose said mortgage for said default; and whereas it is provided in said mortgage, that if such default shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the mortgagees under said mortgage, and all right and equity of redemption therein of said mortgagors shall be forever barred and foreclosed; and said trustees have ever since maintained said possession, and said default has ever since continued, and for the period of more than eighteen months since the filing of said certificates; and said mortgage has been absolutely foreclosed according to its provisions.

And whereas it is provided in said mortgage that, in case of an absolute foreclosure under its provisions, it shall be the duty of such trustees to call a meeting of the holders of the bonds secured thereby for the purposes hereinafter named: Now, therefore, the undersigned, trustees as aforesaid, hereby call a meeting of the holders of the mortgage bonds secured by said mortgage, to be held at Horticultural Hall, Tremont street, in Boston in the State of Massachusetts, on Thursday, the seventeenth day of April A. D. eighteen hundred and seventy-three

at eleven o'clock in the forenoon of said day; and hereby give notice that the object of said meeting is that said bondholders at such meeting may, at an election to be presided over by such of the trustees under said mortgage as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a board of directors of like number with the then board of directors of the Boston, Hartford & Erie Railroad Company, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each; which said corportion shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions, of the Boston, Hartford & Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured by said mortgage at the rate of ten shares for every bond of one thousand dollars, or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid.

The bondholders' attention is especially called to the provisions above stated in regard to voting at this meeting; and they are notified to bring with them to the meeting all bonds held by them, in order that their position as bondholders, and the number of votes they are entitled to cast, may be determined.

WM. T. HART,
GEORGE TALBOT OLYPHANT,
CHARLES P. CLARK,
Trustees.

Boston, Massachusetts, March 18, 1873.

And your orator is informed and believes, and therefore avers, that said notice was not advertised for a sufficient time to allow the bondholders, and especially those in London, England, to attend said meeting and act and vote in the matters affecting their interests which might and should come up therein.

And your orator upon information and belief further avers, that at said meeting were represented some of said bonds held by said State of Massachusetts, and some of the bonds which had been illegally and improperly issued by said Eldridge for his own purposes, and some of the bonds which had been sold to the Erie Railway, as hereinbefore set forth, and a large amount of the bonds which had been bought up at a very small price by said trustees for their own individual and private use, and a large amount of the bonds which had come into their hands by redemption, where the same had been illegally pledged by said railroad, in all amounting to 5812 bonds, and no more, being a little over

one-fourth of the bonds then outstanding, issued under and secured by said Berdell mortgage, the majority of which were bonds of the State of Massachusetts, which were of and from the bonds devoted to and held for the purpose of taking up the underlying liens on said road. And said small minority of said bondholders thereupon proceeded under the direction of said Hart and Clark, said Olyphant being sick or he would have been there, as said Clark reported, to organize a corporation to be called the New York & New England Railroad Company. And the majority of said individuals present, holding said minority of said bonds, elected themselves directors, upon which said board of directors were said Hart and his confederates; and said Hart was afterwards chosen president and said Clark general manager of said road. And said new corporation, then illegally and without warrant of law so created in said Massachusetts, took possession of said road, its property, its franchises, its leases and appurtenances, and claimed to own and operate the same, and continue to operate the same and withhold the same and all the earnings from said creditors of said Boston, Hartford & Erie Railroad, and from your orator and other stockholders and creditors thereof who of right ought to have possession and control of said road, its franchises, rights and property, so that they may operate the same as a railroad for the purposes for which it was organized; to wit, the conveyance of passengers and freight.

And your orator is informed and believes, and therefore avers, that in and by the terms of said Berdell mortgage, it is, among other things provided that the principal sum secured by said bonds which by the terms thereof were to become due and payable in the year 1900, might become due and payable whenever upon due presentation of any of the interest warrants attached to said bonds on or after maturity, and offer to surrender the same, provided said default continued for six months thereafter, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgagor and to the trustees. And your orator avers that no such election by said bondholders ever occurred; that no such notice in writing was ever given to said mortgagor, or to said trustees or any of them, and that a majority of the holders or owners of said bonds never in any way signified their election that said bonds should become due and payable before the maturity thereof by the terms of said bonds and mortgage. And so your orator avers that said bonds are not yet due, and that all action or pretended action of said trustees or any of them to foreclose said mortgage, or to organize a corporation to operate said Boston, Hartford & Erie Railroad is void and of no effect.

And your orator upon information and belief further avers, that at said meeting a vote was passed that the directors so chosen as aforesaid

should audit the accounts of said supposed trustees and take from them a conveyance of all the property and franchises of said road to said company, and also to settle all accounts between the said bondholders and said trustees, and to pay all balances that might be found due.

And your orator upon information and belief further avers, that said Hart and Olyphant were as aforesaid made directors in said New York & New England Railroad, and said Clark was made general manager of said road by them, and they were thereafterwards the most active, prominent and efficient managers of said road; and authorized so to do, did settle their own accounts with themselves, and conveyed the property of said road from themselves as trustees to themselves as directors and managers, they being at the same time very large stockholders of said road; so that your orator is ignorant upon what terms and conditions or in what manner said accounts were settled, or upon what terms or conditions said property was pretended to be conveyed to said New York & New England Railroad Company, and prays that said defendants named may fully discover the same, and refers thereto as part of this his bill. And your orator claims that all such transactions were collusive, illegal and fraudulent, and cannot be supported in law and justice as proper acts and transactions in that behalf, and ought to be set aside and held for nought.

And now, so it is, may it please your Honors, that your orator, and other stockholders and creditors in whose behalf he prays, have, by the means and in the manner hereinbefore set forth, and otherwise, been illegally and unjustly deprived of their rights and property; and the fund out of which the same should have been secured, and the property which would have gone to the payment of the debts of the creditors, has been wholly eloined from them and lost, and converted in manner aforesaid to the use of the several defendants, or some of them, in whole or in part, respectively. And your orator is remediless by the strict rules of the common law, and can have remedy in a court of equity only, where such matters are cognizable and determinable. Wherefore your orator prays,—

First. That a writ of subpœna may issue out of this Honorable Court in due form, commanding the witnesses hereinabove named, and each of them, personally to appear at a time and place certain therein named, and make answer to this bill of complaint of your orator, fully and particularly to each and every allegation thereof, and to make discovery of each and every matter therein set forth which may be in their knowledge, information and belief, as fully, particularly and carefully as if thereunto specifically in each matter thereof inquired of by separate interrogatories, setting forth all sums of money, specifically and

particularly, which in said bill is claimed to have been diverted from your orator; and also each and every secured debt, amount and principal thereof which is charged in said bill to have belonged to said road, or any way appertaining thereto; when, how and for what consideration each came into the possession of either of the defendants; to whom, when and for what consideration it was issued or sold by them, or either of them; and also each and every assignment, conveyance, release, discharge, paper of resignation or of acceptance, deeds of indenture, notices, each and every of them which each received or either received, had, made, issued, gave or executed, and to whom, when and for what consideration; your orator, for obvious reasons, waiving all benefit of the oath of said parties, but requiring said answers to be as full and explicit and particular as if answered under oath.

Second. And your orator further prays your Honors that a writ of injunction in due form may issue from this Honorable Court, commanding, restraining, and enjoining said defendants, or either of them, and particularly and especially said New York & New England Railroad Company, and said Hart and Clark, or either of them, or their associates in the board of directors of said road, the agents, officers or servants thereof, and said board, from making any conveyance, sale, assignment of the rights, property and franchises, or any part thereof, that belongs to said railroad, which belong to or came into the possession or under the control in any form or manner of said New York & New England Railroad, through, by or under the agency of said Hart, Olyphant and Clark, or either of them, upon which said Boston, Hartford & Erie Railroad, or said trustees of said Berdell bonds, or either of them, ever had or now have any claim whatsoever therein; and that they, the said railroad, and said last-named defendants, their agents, servants, and certain attorneys, shall hold all of said property, to be hereafter disposod of according to the order of this Honorable Court to be made herein, and not otherwise.

Third. And your orator prays this Honorable Court that a receiver or receivers may be appointed by this Honorable Court, to take possession of said road, of its property, rights, franchises, leases, emoluments and profits, and have charge of said road and manage and hold the same subject to the direction of this Honorable Court, all the profits and earnings whereof to be paid into said Court, and to abide its order, judgment and decree in the premises.

Fourth. And your orator further prays, that said Berdell, Davis, Gregory, Eldridge, Healey, Farwell, Talbot, Plumer, Kimball, Hart and Clark, and each of them, respectively, who have been appointed or claimed to have been appointed trustees under said Berdell mortgage, may be ordered to account in this Court in due form for each and every

transaction so suffered or permitted by them as such trustees, or while they claimed to act as such trustees; and that upon account, so stated, they shall be ordered to adjust, settle and pay over into the registry of this Court, as this Honorable Court shall order, each and every amount of money that may have come into their possession as trustees, and account for or produce and hold, subject to the order of this Court, each and every security to fulfill any condition which they may have been received under while they claimed to act as such trustees; and that they shall be adjudged to make good and indemnify your orator, the creditors and the other stockholders of said road which they or either of them may have lost by each and every and all the acts, doings, omissions, neglects, and misfeasances of each and all; and stand to and perform such other orders in the premises as to this Court seems meet.

Fifth. And your orator further prays, that this Honorable Court will adjudge and decree said mortgage invalid, void and of none effect, for the reasons herein mentioned; and said bonds issued thereunder to be illegally issued, and therefore void; but that if this Honorable Court shall not so decree, then it will establish and confirm said trusts under said mortgage, will remove all the said defendants or their associates or their agents who may claim to act or be acting for said trustees, and to appoint in place thereof, other proper and fit persons in the judgment of this Honorable Court, by a proper and definitive decree, to take, hold and administer all said trusts and all the property and rights of property, and each and every other thing that may belong or appertain thereto.

Sixth. And your orator further prays this Honorable Court that when trustees shall have been so appointed and qualified to act, the Court, by a definitive decree in that behalf, will order and direct that all said property hereinbefore mentioned, franchises, rights, privileges, appurtenances, equipments, property of every name and nature whatever, either real, personal or mixed, that may be in the control of said defendants, or either of them, or in any way be in their control or possession, shall by proper deeds of conveyance or other assurances of title, to be approved by the Court, be assigned, transferred and set over and delivered to said trustees so appointed, to be held by them under the order of this Honorable Court for the benefit of the creditors, stockholders and your orator, for their use and behoof, as if the same had never been diverted therefrom in any manner or form as hereinbefore set forth.

Seventh. And your orator prays that said New York & New England Railroad, its officers, servants and agents, shall account for all the earnings, of said property, franchises, rights, privileges, and all sums

of money received by them in any way arising from or out of the premises under said last-named trustees, to be held by them under said trust.

Eighth. And your orator prays for such other and further relief in the premises as to justice and equity seem due and meet; and that the said defendants and each of them shall stand to and abide by all orders and decrees of this Honorable Court duly made and adjudged in the premises.

And your orator in duty bound will ever pray.

WILLIAM F. GRAHAM.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

On this 30th day of June, A. D. 1880, personally appeared before me William F. Graham, to me known, who, being by me duly sworn, deposeth and saith that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged to be stated upon information and belief, and as to those matters he believes the same to be true.

WM. F. GRAHAM.

Subscribed and sworn to before me this 30th day of June, A. D 1880.

JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

ALONZO B. WENTWORTH,
Attorney.

BENJ. F. BUTLER,
ROGER A. PRYOR,
HENRY E. KNOX,
Of Counsel.

EXHIBIT A.

MORTGAGE.

BOSTON, HARTFORD & ERIE RAILROAD COMPANY

TO

ROBERT H. BERDELL, DUDLEY S. GREGORY and JOHN C. BANCROFT DAVIS,

Trustees.

This Indenture of Mortgage, made this nineteenth day of March in the year one thousand eight hundred and sixty-six, by and between the Boston, Hartford & Erie Railroad Company, a corporation existing under the laws of the States of New York, Connecticut, Rhode Island and Massachusetts, party of the first part, and Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, trustees, parties of the second part, witnesseth:

Whereas the shareholders of the Boston, Hartford & Erie Railroad Company, at a meeting duly and lawfully called and held at the city of New York, on the fourteenth day of March A.D. 1866, voted to authorize the directors to make application to the several legislatures of the states in which the chartered rights of this road exist, for authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue and dispose of, at the best rates that can be obtained, their convertible mortgage bonds, payable in the city of New York on the first day of July A.D. 1900, for one thousand dollars each, not to exceed the amount of twenty millions of dollars in all (such portion of the principal and interest thereof, however, as the directors of the company may authorize, to be made payable in London in the kingdom of Great Britain, in sterling currency, at the rate of four shillings sterling to the dollar), interest payable semi-annually on the first days of January and July in each year, at the rate of seven per cent. per annum, interest and principal to be payable at such places in the city of New York or in London as the directors may authorize; and the particular form of bonds, interest warrants thereon and mortgage, to be left entirely at the discretion of the board of directors, the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of com-

pleting and equipping their road, and of laying down a third rail so as to form an additional track, corresponding with the gauge of the Erie Railway of New York :

And whereas the said board of directors, at a meeting duly convened and held in the city of New York on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first-mortgage bonds of said company in the following form, when of federal currency; to wit,—

No.——— $1000.

BOSTON, HARTFORD & ERIE RAILROAD COMPANY.

Know all men by these presents, that the Boston, Hartford & Erie Railroad Company, acknowledges itself indebted to Dudley S. Gregory, or bearer, in the sum of one thousand dollars, lawful money of the United States, which sum it promises to pay at its office or agency in the city of New York on the first day of January in the year one thousand nine hundred, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of January and July in each year, on the presentation and delivery of the proper annexed interest warrants.

This bond is one of a series of twenty thousand bonds of even date herewith, issued for the purpose of paying the existing debt of the company and of the completing and equipping their road. The payment of the principal and interest hereof is secured by a mortgage of the railroad and franchises, furniture and equipment of this company bearing date March 19 A.D. 1866, which has been made in trust to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees.

Upon the failure to pay any one of the interest warrants hereto attached, upon due presentation, on or after maturity, and offer to surrender the same, provided said default continue for the space of six months thereafter, this whole series of bonds, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgagor and to the trustees, shall become due and payable.

This bond is convertible at the option of the holder, being then the owner thereof, into the common capital stock of this company, and

upon the surrender of the same, with the proper coupons annexed, the company agrees to issue a certificate or certificates of capital stock therefor, at par, as at any time authorized by law, when this bond will be cancelled.

In witness whereof, this company has caused its corporate seal to be hereto affixed, and this bond to be signed by its president and its secretary, the day of eighteen hundred and sixty-six.

[SEAL]

. . . . . *President.*

. . . . . *Secretary.*

We certify that this bond is one of the twenty thousand bonds of one thousand dollars each (or two hundred pounds each, when in sterling currency), secured by the mortgage referred to above, and that said mortgage has been delivered to us and recorded to us as authorized by law.

} *Trustees.*

And such of the said bonds as shall be made payable in sterling currency, shall be for the principal sum of two hundred pounds sterling, in lieu of one thousand dollars, and the principal and interest thereof shall be made payable at such place in London as the directors of the company shall authorize, in lieu of the office or agency of the company in the city of New York.

And whereas the said directors, at their said meeting, further voted to empower bonds of said form, either in federal currency or sterling currency, or either. hereafter to be issued, and to be secured under the mortgage, and the said corporation thereby to become indebted to the divers persons or bodies politic or corporate who may become the holders thereof, but not in a greater principal sum than twenty millions of dollars in all, or a proportionate part thereof in sterling currency, at the rate of four shillings sterling to the dollar; and further, at the same time voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents:

Now, therefore, this indenture witnesseth, that the parties of the first part, for the better securing and more sure payment of the sums of money mentioned in the said mortgaged bonds, and each of them, according to the tenor thereof, and in consideration of one dollar to them paid by the parties of the second part, at or before the ensealing thereof, the receipt whereof is hereby acknowledged, have granted,

bargained, sold conveyed, aliened, released and confirmed, and by these presents do grant, bargain, sell, convey, alien, release and confirm, unto the said parties of the second part, and the survivor of them, and to his and their successors and assigns, all and singular the railways of said Boston, Hartford & Erie Railroad Company, commencing at the foot of Summer street in Boston in the State of Massachusetts, and running to Willimantic in the State of Connecticut, through Thompson in said Connecticut, and commencing at Providence in the State of Rhode Island and running to said Willimantic, and also commencing on the northerly [*sic*] side of said city of Boston, and running through Woonsocket in said Rhode Island to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York, to the western terminus of the location of the railway of said company on the east bank of the Hudson river at Fishkill; also running from said Willimantic to the city of New Haven in Connecticut; also from a point in said railway in said Thompson to Southbridge in the State of Massachusetts, as said railways are now or shall be located, constructed or improved, under or by virtue of any powers now granted, or that may hereafter be granted or obtained, to locate, construct or use a railroad on any of said indicated lines, with all the lands that are included, or may be included, in the location of said railway, or acquired for the uses of said company within the terminal points aforesaid, but not including the lands at the termini at Boston and at Fishkill which are outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters; also all the like estate, roads, railroads and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed, or belong to or be controlled by the party of the first part.

Together with all the tolls, income, issues and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of the road; also all locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also all the estate, real, personal and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and used, or intended to be used, in the construction and operation of said railroad.

To have and to hold the same, together with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereunto belonging, unto the said parties of the second part, and the survivor of them, and his and their successors and assigns forever, on the trusts, and for the uses and purposes herein declared, and none other.

Provided always, and these presents are upon the express condition, that if the said parties of the first part shall well and truly pay, or cause to be paid, to the holders of the said mortgage bonds or obligagations intended to be secured hereby, and every one of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with interest thereon, and at the times and in the manner therein provided, according to the true intent and meaning of these presents, that then and from thenceforth this indenture, and the estate hereby granted shall cease, determine and be utterly void.

And this indenture further witnesseth, that these presents, and the said mortgage bonds or obligations hereby intended to be secured, are made, executed and delivered upon the terms, conditions and agreements following; that is to say,—

First. That the actual possession, use, management and control of all the granted premises shall remain with the parties of the first part, so long as the said mortgage bonds shall remain without default or forfeiture, who may, from time to time, with the consent of the trustees, in writing, sell or exchange any of the mortgaged estate, and purchase with the proceeds other property, to be included under this indenture.

Second. That in the case of the death, resignation or removal of one of said trustees, the premises hereby conveyed, and the trusts hereby created, shall vest in the survivors or survivor, who shall thereupon appoint in writing, by deed, a person or persons in the place and stead of the trustee or trustees so deceased, resigned or removed; and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed, jointly with the trustees so appointing, as if such appointment had been originally made in this deed; and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect by the trustee in each case remaining. And in case of the decease, removal or resignation of all the said trustees, the vacancies may be filled by any Judge of the Supreme Court of the State of Connecticut, on application of any

party interested, on such notice to the other parties interested as the judge acting shall order; and the trustees so appointed and accepting shall become vested with all the franchises and estate hereby conveyed, on recording or lodging a certified copy of the order for their appointment in all places where this mortgage is required by law to be recorded or lodged.

And this indenture further witnesseth, that the said parties of the first part, for themselves and their successors, do covenant and agree to and with the said parties of the second part, the survivor of them and his and their successors and assigns,—

1*st*. That they will, at their own proper charge, do all things necessary to be done to keep intact the lien hereby created.

2*d*. That they will, at any time or times hereafter, upon the request, of said parties of the second part, their successors or assigns, make, do and execute, and cause to be made, done and executed, all and every such further and reasonable acts, conveyances, assignments and assurances in the law, for the better and more effectual vesting and confirming the premises hereby granted, or intended so to be, in and to the said parties of the second part, their successors and assigns forever, as by the said parties of the second part, their successors or assigns, or their counsel learned in the law, shall be reasonably devised, advised or required.

3*d*. That of the whole issue hereby authorized to be made of said bonds, there shall be retained in the hands of said parties of the second part, such amount of said bonds as shall be equal to the whole amount of the bonds and mortgage notes outstanding from time to time, which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part only on the cancellation of a corresponding amount of said outstanding bonds or mortgage notes.

4*th*. That the party of the first part will, at the close of the year 1869, and at the close of each year thereafter during the continuance of this trust, pay to the parties of the second part, their successors and assigns, a sum equal to ten per cent upon the net earnings for the current year, remaining after the payment of the current interest for that year on the then outstanding bonds issued under this mortgage; which sum the said trustees shall invest, as received, in said mortgage bonds, if the same can be purchased, at not exceeding one hundred and twenty-five per cent; and if they cannot invest the same in said mortgage bonds at that limit, they shall invest them in gold-

bearing securities of the United States; and they shall invest all sums received from interest and dividends on the trust fund in like manner, and shall hold the trust fund as a security for the payment of the said mortgage bonds at maturity, and shall annually, on the first day of January in each year, report the condition of the said trust fund to the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York.

5th. That the parties of the first part will pay unto the holders of the said mortgage bonds, respectively, the said principal sums of money respectively mentioned as above, and as expressed in said bonds, and will pay the interest thereon as the same shall become due and payable.

6th. That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage, shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part, before the same shall be a charge upon any of the sums received from said sales.

7th. That in case default be made by said company in payment of any moneys, either principal or interest, secured hereby (the default continuing for six months), the said company shall, on demand of the trustees or trustee for the time being, or his or their agent, authorized thereto in writing, deliver to said trustees or trustee, or his or their agent, the actual possession of all the herein-granted premises; and thereupon the said parties of the second part shall and may, by themselves, their officers, agents and employees, take, receive and operate the said railroad, franchises and other property and estate hereby conveyed, and collect, receive and have the rents, income and profits thereof, as fully as the party of the first part could do if no default had been made; and while so in possession, the said party of the second part shall apply such part of said rents, income and profits as shall in their judgment be necessary, to the payment on the running and operating expenses of the road, including the necessary repairs of road, road-bed, buildings, machinery and equipment, and all expense of agents, clerks, officers, employees and laborers, and all claims for damages allowed, and all payments for insurance and taxes, and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvement of said roads, buildings, machinery and equipment as the business shall, in their judgment, require, and to the payment of any and all claims necessary to secure and assure to them the estate and franchises hereby conveyed, and to

their own compensation, and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a court of equity in the case of a receiver, as settled and established in the case of the receivership of the New York & Erie Railroad. And the parties of the second part are further authorized and empowered, after having taken possession as aforesaid, to contract with any other corporation to lease or to operate the said railroad and franchises for any period not exceeding the term that the trustees are herein authorized to retain the possession thereof.

8th. Said parties of the second part, having taken possession as aforesaid, shall be further authorized, and may be required, whenever there shall be in their possession a sufficent sum for such purpose (not required for any of the purposes aforesaid), to pay in full any one class (beginning with the earliest) of matured and over-due interest warrants on said bonds, to the person or persons holding and presenting them for payment; and the said parties of the second part shall, while in possession of said roads and operating the same, or causing the same to be operated on a lease thereof, keep full and accurate accounts of all sums received or paid out by them, which shall be at all reasonable times open to the inspection of the party of the first part, and they shall, at least once a year, publish abstracts thereof for the use of the bondholders; and whenever the said parties of the second part are in doubt as to any of their powers or duties in the premises, they may apply to the Supreme Court of the State of Connecticut, or any judge thereof in chambers, for directions, and the directions or order of said court, or of such judge thereof, on their application, when complied with, shall be their full protection for so doing.

9th. On taking possession as aforesaid, the said trustees shall file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a notary public, that they have taken possession of said mortgaged property, franchises and estate, for default in the payment of principal or interest, or both, as the same may be, and of their purpose to foreclose the said mortgage for said default. And if the said default shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the parties of the second part without further assurance and without further process of law, and all right or equity of redemption of the party of the first part therein shall be forever barred and foreclosed; but if the whole of the principal and interest in arrear, with interest thereon, when the same may by law be demanded, and the lawful claims, disbursements and liabilities of

the said trustees, made or incurred as aforesaid on account of their trust, shall be paid and satisfied within the said period of eighteen months after the said notices shall have been filed, either by the said party of the first part (which right they are to have), or out of the net earnings of the property in the trustees' possession, then the said parties of the second part shall surrender unto the said parties of the first part the said mortgaged property, franchises and estate, and all additions made by them thereto, and the said parties of the first part shall thereupon and thereby become revested with the same, as of their former estate, without further assurance.

10*th*. In case of an absolute foreclosure under the provisions of this instrument, it shall be the duty of the trustees to call a meeting of the holders of the mortgage bonds secured by this instrument, by an advertisement of the time and place and object thereof, at least three times a week for three successive weeks, in newspapers published, one in the city of Boston, one in the city of Providence, one in the city of Hartford, one in the city of New York and one in London in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part, or their successors, as shall be present, and in which each bondholder may cast one vote for every one thousand dollars, principal sum of such bonded debt held by him, choose from their number a board of directors of like number with the then board, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions of the Boston, Hartford & Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured hereby, at the rate of ten shares for every bond of one thousand dollars, or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock, at the rate aforesaid. And the said parties of the second part shall, by deed, convey unto the said new corporation all the said mortgaged property, premises, estate and franchises, and all additions thereto, and all moneys remaining in their hands, when they shall be fully paid and indemnified for their services and liabilities as hereinbefore provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation, they shall file in the offices of the several secretaries of state above named, copies of their proceedings in the organization, under their corporate seals, attested by their president and secretary, which shall be *prima facie*

evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation as herein provided.

11*th*. The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said states, as they exist now or may hereafter exist, and any court of competent jurisdiction may enforce any of the provisions of this instrument.

12*th*. Whenever and as soon as any bonds authorized to be issued hereby shall be created, issued, negotiated and sold, the holders of the six per cent. bonds issued by the Boston & New York Central Railroad Company, secured by their mortgage dated March 7, 1854, and the holders of the six per cent. bonds and mortgage notes issued by the New York & Boston Railroad Company, and secured by their mortgage dated December 30, 1862, and each of them, shall have the right, within two years from the time when any of said bonds under this indenture shall be created, issued, negotiated and sold, to exchange their said bonds or mortgage notes for the bonds to be issued under this indenture, upon the following terms; to wit, upon the surrender to the Boston, Hartford & Erie Railroad Company of the said bonds of the Boston & New York Central Railroad Company or of the said bonds or mortgage notes of the New York & Boston Railroad Company, in sums not less than one thousand dollars, with all the unpaid coupons, the said Boston, Hartford & Erie Railroad Company shall give in exchange a seven per cent. Boston, Hartford & Erie Railroad bond for one thousand dollars to be issued under this indenture, drawing interest from January 1, 1867, and for all sums smaller than one thousand dollars certificates shall be issued, exchangeable into said Boston, Hartford & Erie Railroad Company bonds, whenever they are presented to the said Boston, Hartford & Erie Railroad Company in sums of one thousand dollars. And the holders of the seven per cent. bonds issued by the Boston, Hartford & Erie Railroad Company, and secured by their mortgage dated February 2, 1864, and each of them, shall have the right, within the same time, to exchange their said bonds for the bonds to be issued under this indenture, upon the following terms; to wit, upon the surrender to said Boston, Hartford & Erie Railroad Company of said bonds of the Boston, Hartford & Erie Railroad Company, with all the unpaid coupons, the said Boston, Hartford & Erie Railroad Company shall give in exchange seven per cent. Boston, Hartford & Erie Railroad bonds, to be issued under this indenture, for the

amount so surrendered, with certificates, as aforesaid, for all sums smaller than one thousand dollars.

And this indenture further witnesseth, that the parties of the second part do hereby accept the aforesaid trusts, and agree to execute them upon the following terms and conditions which are mutually agreed to by the parties; namely, that neither trustee shall be answerable for the acts, omissions or defaults of the other, to which he does not give his consent; that each shall be answerable for gross negligence and wilful defaults only; that the trustees or either of them, may employ or advise with legal counsel, and that the expenses thereof, and all the personal expenses of the trustees, in discharge of the trust, and all other reasonable and proper charges and expenses of the trustees, including their compensation, shall be paid by the parties of the first part as they are incurred, or otherwise, out of the trust estate on which they are charged; that neither shall be bound to pay or discharge any prior incumbrances on said mortgaged property or estate, nor any part thereof, without being first furnished with means necessary to make such payments by the person so requiring; that they shall not be required to act in the execution of these trusts except at their own option, unless requested in writing by the holders of at least bonds to the amount of fifty thousand dollars, nominal par value, and also furnished with such funds as their counsel shall advise them are necessary and proper to enable them to commence proceedings, and also with a responsible and sufficient agreement to pay the current accruing expenses, obligations and liabilities which they may incur by reason of so acting, and also a reasonable compensation for their so doing; that when called upon to act, they shall be invested with full power to submit all questions of law or fact arising in the execution thereof to arbitrators, and also to compromise and settle any or all such questions; that they may employ agents or attorneys in fact to act for them whenever required to act themselves; and that all the covenants and agreements herein contained or implied may be executed specifically by any court of competent jurisdiction.

In witness whereof, the parties of the first part have caused these presents to be sealed with their corporate seal, and attested by their president and secretary, and the said trustees have signed and sealed these presents the day and year first above written.

Signed, sealed and delivered }
in the presence of }

EXHIBIT B.

To all to whom these Presents shall come, greeting:

The subscribers, William T. Hart, of Boston in the County of Suffolk and Commonwealth of Massachusetts; George Talbot Olyphant, of Greenburg in the County of Westchester and State of New York; and Charles P. Clark, of Newton in the County of Middlesex and Commonwealth aforesaid, trustees by lawful appointment and succession under the indenture of mortgage made by the Boston, Hartford & Erie Railroad Company to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, dated the 19th day of March, one thousand eight hundred and sixty-six, and who have been recognized as such trustees by the proper judicial tribunals in the several States of New York, Rhode Island, Connecticut and Massachusetts, hereby give notice, in accordance with the terms of the said indenture of mortgage, that they have taken possession, pursuant to the provisions of the said indenture of mortgage and of the several decrees of the Supreme Judicial Court of Massachusetts, Supreme Court of Rhode Island, Superior Court of Connecticut and Supreme Court of New York, and all and every other power and authority them thereto enabling, of all and singular the property, franchises and estate conveyed and mortgaged by the said indenture of mortgage, for default in the payment of interest secured by said mortgage (the said default having continued for six months and more for their having taken possession as aforesaid), and for the purpose of foreclosing the said mortgage for said default; and that it is their purpose to foreclose said mortgage for said default.

In witness whereof, we have hereunto set our hands this thirteenth day of September A. D. 1871.

WM. T. HART,
GEO. TALBOT OLYPHANT,
CHARLES P. CLARK.

Executed in presence of
J. B. NONES,
R. R. BISHOP.

STATE OF NEW YORK,
COUNTY AND CITY OF NEW YORK, } ss.: SEPTEMBER 13, 1871.

I, Joseph B. Nones, a notary public, duly commissioned and authorized as such, and residing in said city and County of New York, do certify that on this thirteenth day of September A.D. 1871, personally appeared before me in said city William T. Hart, George Talbot Olyphant, and Charles P. Clark, trustees, who are personally known to me to be the individuals described in and who executed the foregoing instrument; and they then and there subscribed the same in my presence, and severally acknowledged that they executed the said instrument, and that the same was their free will and voluntary act and deed, and that they executed the same freely and voluntarily, for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, in said city of New York, the day and year last above written.

J. B. NONES,
Notary Public, New York,
No. 91 Duane Street.

[SEAL.]

EXHIBIT C.

TRUSTEES UNDER BERDELL MORTGAGE.

RECORD OF APPOINTMENT AND RESIGNATION.

NAMES.	DATE OF APPOINTMENT.	DATE OF RESIGNATION.	MASSACHUSETTS.	RHODE ISLAND.	CONNECTICUT.	NEW YORK.
DUDLEY S. GREGORY.	March 19, 1866.	Dec 31, 1868.	Record of appointment. July 26, 1871, 2:15 P.M. Middlesex Co Sept. 13, 1866, 9:30 A M. Suffolk Co. Aug. 17, 1867. Norfolk Co. Aug. 23 1867. Worcester Co. 3:30 P M Resignation. Aug. 19, 1871, 1:30 P M.	Appointment. Aug. 29, 1867, 12 M. Resignation.	Record of Appintment. Sept. 18, 1867. Resignation. Aug. 3, 1871, 9:15 A M.	Record of Appointment. Sept 28 1867, 3 P.M Dutchess Co. Feb'y 15, 1868. Putnam Co. Resignation. Sept. 26, 1871, 9 A M Dutchess Co. Oct. 4 1871. 2 P.M Putnam Co.
JOHN C. BANCROFT DAVIS.	March 19, 1866.	Dec. 31, 1868.	Appointment. July 26, 1871, 2:15 P.M. Middlesex Co. Sept. 13, 1866, 9:30 A.M. Suffolk Co. Aug. 17, 1867. Norfolk Co. Aug. 23, 1867, 3:30 P.M. Worcester Co. Resignation. Aug. 19, 1871, 1:30 P M.	Appointment. Aug. 29 1867, 12 M. Resignation.	Appointment. Sept 18, 1867. Resignation. Aug. 3, 1871, 9:15 A.M.	Appointment. Sept. 28 1867 3 P.M. Dutchess Co. Feb'y 15, 1868. Putnam Co. Resignation. Sept. 26. 1871 9 A.M Dutchess Co. Oct. 4, 1871 2 P.M Putnam Co.
ROBERT H. BERDELL.	March 19, 1866.	Feb. 27, 1867,	Appointment. July 26 1871. 2:15 P. M. Middlesex Co. Sept. 13, 1866, 9:30 A M Suffolk Co. Aug. 17, 1867. Norfolk Co. Aug. 23. 1867. 3:30 P.M Worcester Co. Resignation. Nov. 19, 1867, 12:45 P.M Suffolk Co. Nov. 25, 1867. Norfolk Co. Dec. 28 1867. 10:20 A.M. Worcester Co.	Appointment. Aug. 29, 1867, 12 M Resignation.	Appointment. Sept. 18, 1867. Resignation. Jan. 24, 1868.	Appointment. Sept. 28, 1867 3 P M. Dutchess Co. Feb'y 15, 1868. Putnam Co. Resignation. Sept. 26. 1871 9 A.M Dutchess Co. Oct. 4 1871, 2 P M. Putnam Co.
JOHN S. ELDRIDGE.	Oct. 28, 1867.	March 16, 1870.	Appointment. Nov. 19, 1867. 12:45 P.M. Suffolk Co. Nov. 25 1867. Norfolk Co. Dec. 28. 18 7. 10:20 A.M. Worcester Co. Resignation. Aug. 19 1871, 1:30 P.M. Suffolk Co.	Appointment. Resignation.	Appointment. Jan. 24, 1868. Resignation. Aug. 3, 1871.	Appointment. Sept. 26 1871. 9 A M. Dutchess Co. Oct. 4, 1871, 2 P.M. Putnam Co. Resignation. Sept. 26, 1871, 9 A M. Dutchess Co. Oct. 4. 1871. 2 P M. Putnam Co.
MARK HEALEY.	Aug. 16, 1869.	March 16, 1870.	Appointment. Aug. 19, 1871, 1:30 P.M. Suffolk Co. Resignation Aug. 19, 1871, 1:30 P.M. Suffolk Co.	Appointment. Resignation.	Appointment. Aug. 3, 1871. Resignation. Aug. 3, 1871.	Appointment. Sept. 26 1871 9 A M. Dutchess Co. Oct. 4 1871, 2:3 P M. Putnam Co. Res'gnation. Sept. 26, 1871, 9 A.M. Dutchess Co. Oct. 4. 1871. 2 P M. Putnam Co.

HENRY N. FARWELL.	Aug. 16, 1869.	March 16, 1870.	Appointment. Aug. 19 1871, 1:30 P.M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept. 26, 1871, 9 A.M. Dutchess Co. Oct. 4, 1871 2:3 P M. Putnam Co
			Resignation. Aug. 19, 1871, 1:30 P.M. Suffolk Co.	Resignation.	Resignation. Aug. 3, 1871.	Resignation. Sept. 23, 1871, 9 A.M. Dutchess Co Oct 4 1871. 2 P M. Putnam Co.
THOMAS TALBOT.	March 16, 1870.	July 10, 1871.	Appointment. Aug. 19 1871, 1:30 P.M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment Sept. 26 187., 9 A.M. Dutchess Co. Oct 4, 1871. 2 P M Putnam Co.
			Resignation. Aug. 19, 1871, 1:30 P.M.	Resignation.	Resignation. Aug. 3, 1871.	Resignation. Sept 26 1871, 9 A M Dutchess Co. Oct. 4. 1871. 2 P M. Putnam Co.
MOSES KIMBALL.	March 16, 1870.	July 10, 1871.	Appointment. Aug. 19, 1871, 1:30 P.M. Suffolk Co,	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept 26, 1871, 9 A.M. Dutchess Co. Oct. 4 1871, 2 P.M. Putnam Co.
			Resignation. Aug. 19, 1871, 1:30 P M. Suffolk Co.	Resignation.	Resignation. Aug. 3, 1871.	Resignation. Sept 26 1871 9 A.M. Dutchess Co. Oct 4, 1871 2 P.M. Putnam Co.
AVERY PLUMER	July 25, 1870.	July 17, 1871.	Appointment. Aug. 19, 1871, 1:30 P M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept. 26, 1871 9 A.M. Dutchess Co. Oct. 4, 1871 2 P.M. Putnam Co.
			Resignation. Aug. 19, 1871, 1:30 P.M. Suffolk Co.	Resignation.	Resignation. Aug. 3, 1871.	Re ignation. Sept. 26. 1871, 9 A.M. Dutchess Co. Oct. 4. 1871. 2 P.M. Putnam Co.
WILLIAM T. HART.	July 14, 1871.		Appointment Aug. 19, 1871 1:30 P.M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept. 26, 1871, 9 A.M. Dutchess Co. Oct 4, 1871. 2 P M. Putnam Co.
			Resignation.	Resignation.	Resignation.	Resignation.
CHARLES P CLARK.	July 14, 1871.		Appointment. Aug. 19, 1871, 1:30 P M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept. 26. 1871, 9 A M. Dutchess Co. Oct. 4 1871, 2 P.M. Putnam Co.
			Resignation	Resignation.	Resignation.	Resignation.
GEO. TALBOT OLYPHANT.	July 19, 1871.		Appointment Aug. 19, 1871, 1:30 P.M. Suffolk Co.	Appointment.	Appointment. Aug. 3, 1871.	Appointment. Sept. 26 1871 9 A.M. Dutchess Co. Oct. 4, 1871 2 P M. Putnam Co.
			Resi nation.	Resignation.	Resignation.	Resignation.

SCHEDULE A.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS,

IN EQUITY.

WILLIAM F. GRAHAM,
Complainant,

against

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS,
Respondents.

AMENDMENT TO BILL.

And now your Orator comes in and moves this Honorable Court for leave to amend the bill in said cause in manner following, to wit:

On page 28 of the printed bill by striking out the paragraph.

"And your orator upon information and belief further avers, that while said Ellis suit was pending, to wit, in October, 1870, and induced thereto by the proceedings threatened to be taken thereunder, one Adams claiming to be a creditor to a small amount, petitioned the District Court of the United States for the District of Massachusetts, that said Boston, Hartford & Erie Railroad Company might be declared bankrupt under the provisions of the bankrupt law of the United States then being, and that all the property, rights, franchises and privileges might thereunder, and by virtue of said proceedings in bankruptcy, pass to assignees thereafter to be chosen. And such further proceedings were had that on the 2d of March, 1871, an adjudication of involuntary bankruptcy was made, and a decree in due form of law by said District Court, and Charles S. Bradley, George M. Barnard and Charles R Chapman were appointed assignees; and by a duly executed deed of assignment all the property, franchises, rights and privileges of said Boston, Hartford & Erie Railroad Company were conveyed to said assignees."

And insert the following in place thereof,

68 & 69 Upon the filing of the bill of complaint, as aforesaid, a writ of subpœna issued, directed to the defendants, commanding them to appear at the rules to be holden at the office of the clerk of this court, in Boston, on the second day of August then next, to answer thereto. Whereupon the marshal of our district made his return, as follows:

UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

BOSTON, *July* 31, 1880.

I hereby certify that I have served the within subpœna by, June 10th, delivering duly attested copies of the same to the within-named Emily W. Healey & Mary A. W. Healey; June 12, to Charles Endicott, Avery Plumer, George M. Barnard, George B. Phippen,
70 treasurer N. Y. & N. E. Railroad Company; W. C. Eayrs, W. T. Hart; and I served on said Chas. S. Bradley by delivering a like copy for him in hands of Geo. M. Barnard, coassignee. I served on said Moses Kimball by leaving a like copy at his last and usual place of abode in said Boston; on said H. N. Farwell by leaving a like copy at his last and usual place of abode with his wife; on said Thomas Talbot by leaving a like copy at his last and usual place of abode in Billerica in hands of an adult servant; on said Chas. P. Clark by delivering a like copy to J. F. C. Hyde, his authorized agent, at Newton. I also served on said Boston, Hartford & Erie Railroad Company by delivering a like copy to W. T. Hart, as trustee of said railroad company; also delivered a like copy
71 in hand to William H. Long, as he is sole administrator of the estate of John S. Eldridge, late president or director of said railroad company.

N. P. BANKS,
U. S. Marshal.

Serv.	30	
Copies	15	
Exp.	5	93
	$50	93

Upon the return of said subpœna as served upon the defendants named in the marshal's return thereon, and upon entry of said cause as pending in this court, at the August rules, A. D. 1880, appearances were entered by the defendants, as follows:

William T. Hart, who was served with the subpœna in this cause as trustee of the Boston, Hartford and Erie Railroad Company, appeared by his attorney, George W. Baldwin.

Thomas Talbot appeared by his attorney, John P. Healy.
72 Moses Kimball appeared by his attorney, John P. Healy.
Avery Plumer appeared by his attorney, John P. Healy.

William T. Hart and Charles P. Clark appeared by their attorneys, T. K. Lothrop and George W. Baldwin.

W. C. Eayrs appeared by his attorney, Richard Olney.

The New York and New England Railroad Company appeared by their attorneys, William G. Russell and George W. Baldwin.

Charles S. Bradley, Charles R. Chapman, and George M. Barnard, assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, appeared by their attorneys, Rapes, Gray & Loring.

Charles Endicott, treasurer of the Commonwealth of Massa-
73 chusetts, appeared by his attorneys, George Marston and F. H. Gillett.

Emily W. Healey and Marianne W. Healey, executrices of the will of Mark Healey, appeared by their attorney, Charles M. Reed.

On the ninth day of August, A. D. 1880, the following demurrer was filed, namely:

Demurrer of the Assignees of the Boston, Hartford & Erie Railroad Company, in Bankruptcy. [*Filed Aug.* 9, 1880.]

The demurrer of Charles S. Bradley, Charles R. Chapman, and George M. Barnard, defendants, to the bill of complaint of William F. Graham, the above-named plaintiff.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint to be
74 true in such manner and form as the same is therein set forth and alleged, do demur to said bill, and for cause of demurrer show that the plaintiff hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from these defendants or either of them, or to any relief against them or either of them, as to the matters contained in the said bill or any of such matters.

And, furthermore, for cause of demurrer, the defendants show that it appears on the face of the said bill that the same was not filed within two years from the day of the appointment of these defendants as assignees of the said Boston, Hartford & Erie Railroad Company.

75 And, furthermore, for cause of demurrer, these defendants show that the plaintiff has been guilty of laches, and also that his said bill is multifarious.

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, these defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to this bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

I, John C. Gray, junior, of counsel for the above-named defendants, do certify that the above demurrer, in my opinion, is well founded in point of law.

JOHN C. GRAY, JR.

I, George M. Barnard, for myself and the other above-demurring defendants, assignees in bankruptcy of the Boston, Hartford &

76 Erie Railroad Company, on oath declare and say that the above demurrer is not interposed for delay.

GEORGE M. BARNARD.

UNITED STATES OF AMERICA, *District of Massachusetts:*

BOSTON, *August 6th*, 1880.

Personally appeared the above-named George M. Barnard, and on oath declared and said that the foregoing affidavit by him subscribed is true. Before me—

WM. S. DEXTER,
United States Commissioner.

On the third day of September, A. D. 1880, the following demurrers were filed, namely:

Demurrer of William T. Hart and Charles P. Clark. [*Filed Sept.* 3, 1880.]

77 The demurrer of William T. Hart and Charles P. Clark, two of the defendants in the above-entitled suit.

These defendants, by protestation, not confessing or admitting all or any of the matters and things set forth in the complainant's bill to be true as therein alleged, do demur thereto, and for causes of demurrer say—

First. That the complainant hath not by his said bill made or stated such a case as entitles him in a court of equity to any discovery from or relief against these defendants.

Second. That the complainant purports to bring said bill as a stockholder of the Boston, Hartford and Erie Railroad Company, and in behalf not only of himself, but of every other stockholder and creditor of said corporation who may see fit to join therein, and

78 defendant insists that the creditors of said corporation have not a common interest with the complainant and are improperly joined as plaintiffs in said bill.

Third. That it appears by the complainant's own showing that Matthew Bolles, Michael C. Bolles, and James C. Ayer are interested in the subject-matter of said bill and should be made parties thereto, but that the complainant has not joined them as parties.

Fourth. That it appears by complainant's bill that there are sundry mortgages which are claimed to be existing liens upon the whole or portions of the roads, property, and franchises of the Boston, Hartford and Erie Railroad Company, and to be prior in security to

79 the mortgage of Robert H. Berdell and others, and that one of said mortgages was made to the treasurer of the State of Connecticut, as trustee, and that the rest of said mortgages were made to other parties, as trustees, who are not named in said bill, and that all of said trustees have an interest in the subject-matter of said bill and should be made parties thereto, which the complainant has failed to do.

Fifth. That it appears by the plaintiff's own shewing that said Boston, Hartford and Erie Railroad Company has been lawfully

adjudicated bankrupt, and that assignees thereof have been duly appointed, and have received a duly-executed deed of assignment of all the property, franchises, rights, and privileges of said Boston, Hartford and Erie Railroad Company, and that thereby all rights of action for the matters complained of in said bill passed to
80 said assignees, and complainant has not shewn any demand upon them to bring suit therefor, or any sufficient right or interest in himself to maintain this bill.

Sixth. That it appears by the complainant's bill that an adverse interest is therein claimed touching property or rights of property transferable to or vested in the assignees in bankruptcy of said Boston, Hartford and Erie Railroad Company, and that the same was not filed until more than two years had elapsed from the time when the cause of action accrued for or against said assignees, wherefor the complainant's suit is barred by law.

Seventh. That it appears by the complainant's bill and the
81 public statutes therein referred to that the Boston, Hartford and Erie Railroad Company has been dissolved and the statutes incorporating the same repealed more than three years before the bringing of said bill, and that the alleged cause of action set forth by complainant as a stockholder in said corporation is barred by law.

Eighth. That it appears by the said bill that the same is exhibited against these defendants and numerous other parties as defendants thereto for several distinct matters and causes, in many whereof, as appears by said bill, these defendants are in nowise interested, and by reason of such distinct matters said bill is multifarious, and is drawn out to an unreasonable length, and these defendants
82 will be put to unnecessary charges and expenses in matters which in no way relate to or concern them.

Ninth. That it appears by said bill that these defendants claim to have obtained title to the rights, property, and franchise of the Boston, Hartford and Erie Railroad Company under the foreclosure of a mortgage referred to and described in said bill, and the said complainant does not offer to redeem said mortgage, in case the same shall be adjudged valid.

Tenth. That it appears by the complainant's own shewing that a suit is now pending in the supreme judicial court of Massachusetts, a court of competent jurisdiction, against said Boston, Hartford and Erie Railroad Company and others named therein, wherein
83 receivers were appointed, who took possession of said railroad, and wherein certain decrees were made which the complainant seeks to set aside in this suit, and certain transfers and conveyances ordered which the complainant prays this court to enjoin; and the defendant insists that the complainant, by proper proceedings in said pending suit, should seek such relief as he may be entitled to, and that his bill in this court should be dismissed.

Eleventh. That it appears by said bill that substantial relief is sought therein against the State of Massachusetts by reason of alleged fraudulent acts of said State, and that said State is an interested party, but has not been and cannot be made a defendant to said bill, and is not properly represented therein.

Twelfth. That it appears by said bill that the matters and
84 things therein complained of are of long standing and public notoriety, and that *that* there has been gross and inexcusable delay in seeking the relief claimed by said bill, and that in the meantime the possession of the property therein described has changed and rights therein which are adverse to the complainant's claim have been established under decrees of courts of competent jurisdiction, by reason whereof, and of the laches of the complainant and others having like interests with him, the relief prayed for in said bill ought not to be enforced.

Wherefore, and for divers other errors in said bill contained and
85 appearing on the face thereof, these defendants do demur thereto, and crave the judgment of this honorable court whether they are compellable or ought to make further or other answer thereunto; and these defendants pray to be hence dismissed, with their costs and charges in this behalf sustained.

WM. T. HART.
CHARLES P. CLARK,
By WM. T. HART.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

SEPTEMBER 2*d*, 1880.

Then personally appeared before the undersigned the above-named William T. Hart, in behalf of himself and of the above-named Charles P. Clark, and made oath that the foregoing demurrer is not interposed for delay.

Witness my hand and official seal the day and year first above written.

[SEAL.] JAMES W. PERKINS,
Notary Public.

86 I, George W. Baldwin, of counsel for the demurring defendants hereinabove named, hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

G. W. BALDWIN.

Demurrer of the New York and New England Railroad Company.
[*Filed Sept.* 3, 1880.]

The demurrer of the New York and New England Railroad Company, one of the defendants named in the bill of complaint in the above-entitled suit.

This defendant, by protestation, not confessing or acknowledging all or any of the matters in and by said bill complained of to be true in manner and form as the same are therein alleged,
87 doth demur to said bill, and for causes of demurrer shews—

First. That the complainant hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from or any relief against this defendant as to the matters contained in said bill, or any of them.

Second. That the complainant purports to bring said bill as a stockholder of the Boston, Hartford and Erie Railroad Company, and in behalf not only of himself, but of every other stockholder and creditor of said corporation who may see fit to join therein; and defendant insists that the creditors of said corporation have not a common interest with the complainant, and are improperly joined as plaintiffs in said bill.

88 Third. That it appears by the complainant's own shewing that Matthew Bolles, Michael C. Bolles, and James C. Ayer are interested in the subject-matter of said bill, and that the complainant has not joined them as parties thereto.

Fourth. That it appears by the complainant's own shewing that there are sundry mortgages which are alleged by him to be existing liens upon the whole or portions of the roads, property, and franchises of the Boston, Hartford and Erie Railroad Company, and to be prior in security to the mortgage to Robert H. Berdell and others, and that one of said mortgages was made to the treasurer of the State of Connecticut as trustee, and that the rest of said

89 mortgages were made to other parties as trustees, who are not named in said bill, and that all of said trustees have an interest in the subject-matter of said bill and should be made parties hereto, which the complainant has failed to do.

Fifth. That it appears by the complainant's own showing that said Boston, Hartford and Erie Railroad Company has been lawfully adjudicated bankrupt, and that assignees thereof have been duly appointed and have received a duly executed deed of assignment of all the property, franchises, rights, and privileges of said corporation, and that thereby all rights of action for the matters complained of in complainant's bill passed to said assignees,

90 and complainant has not shewn any demand upon them to bring suit therefor or any sufficient right or interest in himself to maintain said bill.

Sixth. That it appears by complainant's bill that an adverse interest is therein and thereby claimed touching property or rights of property transferrable to or vested in the assignees in bankruptcy of said Boston, Hartford and Erie Railroad Company, and that the same was not filed until more than two years had elapsed from the time when the cause of action accrued for or against said assignees; wherefor- the complainant's suit is barred by law.

Seventh. That it appears by the complainant's bill and the public statutes therein referred to that the Boston, Hartford and

91 Erie Railroad Company has been dissolved, and that the statutes incorporating the same repealed more than six years before the bringing of said bill, and that the alleged cause of action set forth by complainant as a stockholder in said corporation is barred by law.

Eighth. That it appears by the complainant's bill that the same is exhibited against this defendant and numerous other parties as defendants thereto for several distinct matters and causes, in many whereof, as appears by said bill, this defendant is in nowise interested, and by reason of such distinct matters said bill is multifarious

and is drawn out to an unreasonable length, and this defendant will be put to unnecessary charges and expenses in matters which
92 in no way relate to or concern him.

Ninth. That it appears by said bill that this defendant claims title to the rights, property, and franchise of the Boston, Hartford and Erie Railroad Company under the foreclosure of a mortgage referred to and described in said bill, and the said complainant does not offer to redeem said mortgage in case the same shall be adjudged valid.

Tenth. That it appears by the complainant's own shewing that a suit in equity is now pending in the supreme judicial court of Massachusetts, a court of competent jurisdiction, against said Boston, Hartford and Erie Railroad Company and other defendants
93 named therein, wherein receivers were appointed who took possession of said railroad, and wherein certain decrees were made under which this defendant claims title, and which the complainant seeks to set aside by this suit, and wherein certain transfers and conveyances were ordered which the complainant prays this court to enjoin; and defendant insists that the complainant, by proper proceedings in said pending suit, should seek such relief as he may be entitled to, and that his bill in this court should be dismissed.

Eleventh. That it appears by said bill that the matters and things therein complained of are of long standing and public notoriety, and that there has been gross and inexcusable delay in seeking the relief claimed by said bill, and that in the meantime the
94 possession of the road and property therein described has changed and rights therein which are adverse to the complainant's claims have been established by and under decrees of court- of competent jurisdiction, by reason whereof, and of the laches of the complainant and others having like interests with him, the relief prayed for in said bill ought not to be enforced.

Wherefor-, and for divers other errors in said bill contained, and appearing on the face thereof, this defendant doth demur thereto, and craves the judgment of this honorable court whether it is compellable or ought to make further or other answer thereunto; and this defendant prays to be hence dismissed, with its costs
95 and charges in this behalf sustained.

NEW YORK AND NEW ENGLAND
RAILROAD COMPANY,
By WM. T. HART, *President.*

I, George W. Baldwin, of counsel for the demurring defendant hereinabove named, certify that the foregoing demurrer is, in my opinion, well founded in point of law.

G. W. BALDWIN.

DISTRICT OF MASSACHUSETTS, *Suffolk*, } ss:

SEPTEMBER 1, 1880.

Then personally appeared the above-named William T. Hart, in behalf of the New York and New England Railroad Company, and made oath that the foregoing demurrer is not interposed for the purposes of delay.

Witness my hand and official seal the day and year first above written.

[SEAL.] ALFRED D. FOSTER,
Notary Public.

96 On the same third day of September, A. D. 1880, the following plea was filed, namely:

Plea of William T. Hart. [*Filed Sept.* 3, 1880.]

The plea of William T. Hart, who has been served with process in the above-entitled suit as the representative of the Boston, Hartford and Erie Railroad Company.

The said William T. Hart doth plead to the said bill without admitting any of the matters and things therein set forth to be true, and for plea he says he was duly served with process as the representative of the said Boston, Hartford and Erie Railroad Company, as appears by the return of the marshal upon the writ in the above-entitled suit, and that at the date of said writ and more
97 than six years previous thereto said corporation had been dissolved by proper proceedings and decree in a court of competent jurisdiction in the State of Connecticut, under the laws whereof said corporation was organized, as will more fully appear by a duly authenticated copy of the record of such proceedings and decree annexed herete and made a part hereof.

And for further plea the said William T. Hart, so served with process as aforesaid, says that at the date of said writ and more than six years previous thereto the statute incorporating said Boston, Hartford and Erie Railroad Company in the Commonwealth of Massachusetts was repealed and said corporation dissolved by chapter three hundred and thirty-four of the acts passed by the
98 general court of said Commonwealth in the year eighteen hundred and seventy-four.

All which matters and things the said William T. Hart, so served with process as aforesaid, avers to be true, and pleads the same in abatement of said suit.

WM. T. HART.

I, G. W. Baldwin, of counsel for the above-named William T. Hart, hereby certify that in my opinion the foregoing plea is well founded in point of law.

G. W. BALDWIN.

DISTRICT OF MASSACHUSETTS, *Suffolk*, } *ss:*

Then personally appeared the above-named William T. Hart, and made oath that the foregoing plea is true in point of fact,
99 and that it is not interposed for the purpose of delay.

Witness my hand and official seal the day and year first above written.

[SEAL.] ALFRED D. FOSTER,
Notary Public.

[MEMORANDUM.—The copy of the record referred to in the above plea as annexed thereto remains in the files and of record in this circuit court, but is not extended upon this record, as the said plea was not set down for hearing, and no action thereon has been had by or before the court.

JOHN G. STETSON, *Clerk.*]

On the sixth day of September, A. D. 1880, the following
100 demurrer was filed, namely:

Demurrer of Charles Endicott, Treasurer of Commonwealth of Massachusetts. [*Filed Sept.* 6, 1880.]

And now comes the above-named Charles Endicott, as he is treasurer, &c., and files this his demurrer to the bill of complaint of the above-named William F. Graham, the complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth & alleged, doth demur to said bill, and for cause of demurrer sheweth:

1. That it appears by the said bill that the same is exhibited against the defendant and the several other persons & corporations therein named as defendants thereto for distinct matters and
101 causes, in several any many whereof, as appears by said bill, this defendant is not in any manner or relation interested or concerned, and that said bill is altogether multifarious.

2. That the plaintiff hath not in and by his said bill made or stated such a case as entitles him in a court ef equity to any discovery from this defendant or to any relief against him as to any matters in said bill contained.

3. That it is nowhere alleged in said bill with what functions and powers this defendant, as he is treasurer, &c., is charged and entrusted, nor of what papers, stocks, bonds, & property pertaining to the subject-matter of the bill he was at the time of filing said bill the custodian under any laws of the said Commonwealth, nor
102 under what laws, if any, he was such custodian as alleged.

4. That it is nowhere alleged in said bill that this defendant was treasurer & receiver general of the Commonwealth of Massachusetts at the time when any of the matters and things set forth and complained of in the bill were done and transacted, or that he

had any knowledge or cognizance thereof, either personally or officially.

Wherefore this defendant doth demurr to the said bill of complaint, and prays judgment of this honorable court whether he shall be compelled to make other or further answer to the same, and prays that he may be hence dismissed & for his costs in this behalf most wrongfully sustained.

CHARLES ENDICOTT,
By GEO. MARSTON &
F. H. GILLETT,
His Solicitors and Attorneys.

103 GEO. MARSTON,
F. H. GILLETT,
Of Counsel.
CHAS. ENDICOTT,
Treas'r & Rec'r General.

I, George Marston, of counsel in the above-entitled cause for the said Charles Endicott, as he is treasurer, &c., hereby certify that I am of opinion that the foregoing demurrer is well founded in point of law, and that the same is not interposed for delay.

GEO. MARSTON,
Of Counsel.

SUFFOLK, *ss:*

SEPTEMBER 6TH, 1880.

Personally appeared Charles Endicott, above named, and made oath that the matters and things set forth in the foregoing demurrer & certificate of counsel thereon are true.

Before me—

HENRY B. PEIRCE,
Just. of Peace.

104 This cause was thence continued to the October term, A. D. 1880, of this court, when the following petitions of persons to be made parties complainant were filed, namely:

Petition of Henry J. Cullen, Jr. [*Filed Dec.* 13, 1880.]

To the circuit court of the United States for the district of Massachusetts:

The petition of Henry J. Cullen, Jr., public administrator in the county of Kings, State of New York, respectfully shows to this honorable court, as follows:

I. That your petitioner is and for some time last past has been public administrator as aforesaid in the county of Kings, in the State of New York; that as such public administrator letters
105 of administration were duly issued to him by the surrogate of the county of Kings, to whom jurisdiction in that behalf rightfully belonged, upon the goods, chattels, and credits of John Graham, deceased, on the 22d day of November, in the year 1880.

II. That among the personal property of the said John Graham, deceased, your petitioner finds one hundred shares of the capital stock of the Boston, Hartford and Erie Railroad Company, being the same corporation referred to and made defendant in the action hereinafter mentioned, of which stock said deceased was the owner, holder, and possessor at the time of his death, and which ever since has remained unadministered upon and unassigned.

III. That a suit in equity has been commenced in this
106 court by William F. Graham on his own behalf and on behalf of every stockholder of the said Boston, Hartford and Erie Railroad Company who might see fit to join therein and contribute to the expense thereof, against the said Boston, Hartford and Erie Railroad Company and other respondents, and that a bill of complaint has been duly filed in said action in the office of the clerk of this court, to which bill of complaint your petitioner refers as part of this his petition.

IV. That your petitioner is desirous of coming in as a party complainant in said suit as public administrator, as aforesaid, upon the goods and chattels, as aforesaid, of John Graham, deceased,
107 and of taking such steps for the securing and protecting of his rights as administrator of said deceased stockholder as he may be advised; and therefore he applies to this honorable court for leave so to come in, with such other and further order in the premises as to this court may seem just and proper.

And your petitioner will ever pray, etc.

HENRY J. CULLEN, JR.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Henry J. Cullen, Jr., having been duly sworn, doth depose and say that he is the petitioner referred to in the above petition, and public administrator in the county of Kings, in the State of New York; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge,
108 except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY J. CULLEN, JR.

Sworn to before me this 23d day of November, 1880.

[SEAL.] JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. of N. Y.

Petition of George J. Carey. [*Filed Dec.* 13, 1880.]

To the circuit court of the United States for the district of Massachusetts:

The petition of George J. Carey respectfully shows to this honorable court—

I. That your petitioner is a citizen of the State of New York and 21 years of age and upwards; that he has been ever since the latter

part of 1872 and is now the owner, possessor, and holder of two thousand shares of the capital stock of the Boston, Hartford & Erie Railroad Company.

II. That a suit in equity in this court has been brought by William F. Graham on his own behalf and on behalf of every stockholder and creditor of said Boston, Hartford & Erie Railroad Company who may see fit to join therein and contribute to the expense thereof, against the said Boston, Hartford & Erie Railroad Company and others, respondents, a copy of the bill therein being annexed hereto, and reference thereunto is hereby made to disclose the objects sought to be attained thereby.

III. That your petitioner is desirous of coming in as a party complainant in said suit, and of taking such steps for the securing and protecting of his rights as such stockholder as he may be advised.

109 And therefore he hereby applies to this honorable court for leave so to come in, with such other and further order in the premises as to this court may seem just and proper.

And your petitioner will ever pray, &c.

GEORGE J. CAREY.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

George J. Carey, having been duly sworn, doth depose and say that he is the petitioner referred to in the above petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEORGE J. CAREY.

Sworn to before me this 4th day of December, 1880.

[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

Petition of Amelia Teresa Raymond. [*Filed Dec.* 13, 1880.]

To the circuit court of the United States for the district of Massachusetts:

The petition of Amelia Teresa Raymond respectfully shows to this honorable court--

First. That your petitioner was born at Keokuk, in the State of Iowa, on the 9th day of November, in the year 1859; that on or about the — day of ——, 1872, she became, by gift from her mother, Annie Raymond, widow of —— Raymond, the owner of one hundred shares of the stock of the Boston, Hartford & Erie Railroad Company, which ever since have remained and now are the property of your petitioner.

Second. That a suit in equity in this court has been brought by one William F. Graham on his own behalf and on behalf of every stockholder and creditor in said Boston, Hartford & Erie Railroad

Company who may see fit to join therein and contribute to the expense thereof, against the said Boston, Hartford & Erie Railroad Company and others, respondents, a copy of the bill therein being annexed hereto, and reference thereunto is hereby made to disclose the objects sought to be attained thereby.

Third. That the fraudulent, collusive, and illegal transactions in said bill set forth, whereby your petitioner was illegally and unjustly deprived of her rights and property as a stockholder of said
110 Boston, Hartford & Erie Railroad Company, occurred during the infancy of your petitioner and without her knowledge; that she has recently learned of the same, and attained her majority on the 9th day of the present month, and that thereupon she hereby applies to this honorable court for leave to come in as party complainant in said suit, and as such to take such steps for the securing and protecting of her rights as she may be advised.

And your petitioner will ever pray.

AMELIA TERESA RAYMOND.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Amelia Teresa Raymond, having been duly sworn, doth depose and say that she is the petitioner referred to in the above petition, and that she has read the same and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

AMELIA TERESA RAYMOND.

Sworn to before me this 20th day of November, 1880.

[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

The foregoing petitions of Henry J. Cullen, Jr., George J. Carey, and Amelia Teresa Raymond to become, respectively, parties complainant in this cause, were presented to the court, the Honorable Thomas L. Nelson, district judge, sitting, and counsel for the petitioners and counsel for the parties in the cause were heard
111 thereon; and on the twenty-ninth day of December, A. D. 1880, the Honorable Thomas L. Nelson, district judge, sitting, the said petition of Henry J. Cullen, Jr., was denied, and leave was granted to the said George J. Carey and to the said Amelia Teresa Raymond to become parties complainant in this cause upon filing supplemental complaints in apt words to make them such. In pursuance of said leave granted, the following paper was filed:

And thereupon, on December 29, 1880, upon the allowance of her petition to become a party complainant in said cause, came said Amelia Teresa Raymond, and joined as a party complainant
112 with the said William F. Graham in the said bill of complaint.

On the twenty-seventh day of December, A. D. 1880, the following demurrer was filed:

Demurrer of Marianne W. Healey et al., Executors. [*Filed Dec.* 27, 1880.]

The demurrer of Marianne W. Healey and Emily W. Healey, executrices of the will of Mark Healey, to the bill of complaint of William F. Graham, the above-named complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any discovery or relief from or against these defendants touching the matters contained in the said bill or any of such matters.

And furthermore, for cause of demurrer, these defendants show that it appears by the said bill that the same is exhibited against these defendants and the other parties named as defendants in said bill for several and distinct matters and causes, in many whereof, as appears by said bill, these defendants are not in any manner interested or concerned, by reason of which distinct matters the said complainant's said bill is drawn out to a considerable length, and these defendants are compelled to take copies of the whole thereof; and by joining distinct matters together which do not depend on each other in the said bill the pleadings, orders, and proceedings will, in the progress of this suit, be intricate and prolix, and these defendants be put to unnecessary charges in taking copies of the same, although several parts in no way relate to or concern them.

And furthermore, for cause of demurrer, these defendants show that it appears by the said bill that said complainant has been guilty of laches and neglect in instituting this suit, whereby he has lost the right to prosecute the same in a court of equity, if he ever had any such right, which these defendants, by protestation, deny.

113 Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to said bill, and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill; and they pray to be hence dismissed, with their reasonable costs in this behalf sustained.

By their Solicitor, CHAS. M. REED.

I certify that, in my opinion, the foregoing demurrer of Marianne W. Healey and Emily W. Healey to the bill of complaint of William F. Graham, complainant, is well founded in law and proper to be filed in the above cause.

CHAS. M. REED,
Solicitor & of Counsel for said Defendants.

STATE OF MASSACHUSETTS, *Suffolk*, } *ss:*

Marianne W. Healey and Emily W. Healey, the defendants named in the foregoing demurrer to the bill of complaint in this
114 suit, being duly sworn, depose and say that they have read the same, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

MARIANNE W. HEALEY.
EMILY W. HEALEY.

SUFFOLK, *ss:*

BOSTON, *August* 31, 1880.

Subscribed and sworn to before me—
[SEAL.] GEORGE A. O. ERNST,
Notary Public.

On the twenty-first day of March, A. D. 1881, the following supplemental bill of complaint was filed:

Supplemental Bill of Complaint. [*Filed March* 21, 1881.]

115 Humbly complaining, shows unto your honors: William F. Graham, of Ireland and the Kingdom of Great Britian, an alien and subject of Great Britain, did, on eighth day of July, A. D. 1880, exhibit his original bill of complaint in this honorable court against the Boston, Hartford & Erie Railroad Company and others, praying, among other things, that Charles Endicott, of Canton, in said district of Massachusetts, as he was, at the time of the filing of said plaintiff's original bill of complaint, treasurer and receiver general of the Commonwealth of Massachusetts, be commanded, by a writ of subpœna issued from this honorable court, to appear before said court and make answer to plaintiff's bill of complaint at a time and place therein made certain.

And your orator further shows that since the filing of said original bill of complaint and after due proceedings had in all respects as required by law, on the nineteenth day of January, A. D. 1881, all the papers, stock, bonds, and property in the custody and possession of said Charles Endicott, as treasurer and receiver general of said Commonwealth of Massachusetts, as set forth in said plaintiff's original bill of complaint, has passed out of said Charles Endicott's custody and possession, and has passed into the possession and custody of Daniel A. Gleason, of Medford, in said district of Massachusetts, as said Gleason is and has been ever since said nineteenth day of January, A. D. 1881, treasurer and receiver general of the Commonwealth of Massachusetts, charged with certain functions and charged with certain powers, and the custodian, under the law of said Commonwealth, of the papers, stock, bonds, and property involved in and pertaining to the subject-matter of said suit, and possessed by the said Commonwealth, as set forth in plaintiff's original bill of complaint.

Wherefore your orator prays that a writ of subpœna may issue out of this honorable court, in due form, commanding the said Daniel A.

Gleason to appear before this honorable court at a time and place therein named and put in an answer thereto to said plaintiff's bill of complaint, and abide such order, direction, and decree in the said premises as to your honors seem just:

To the end, therefore, that your orator may have full benefit of the suit or complaint and the proceedings therein against the said Daniel A. Gleason, and may have the same relief against him that your orator might and could have had against the said Charles Endicott, as prayed for in the plaintiff's original bill of complaint.

WM. F. GRAHAM,
By B. F. BUTLER,
Of Counsel.

B. F. BUTLER,
Of Counsel.

116 Upon the filing of said supplemental bill of complaint, as aforesaid, a writ of subpœna issued, directed to said Daniel A. Gleason, treasurer and receiver general of the Commonwealth of Massachusetts, commanding him to appear at the rules to be holden at the office of the clerk of this court, in Boston, on the second day of May then next, to answer thereto, which subpœna was duly returned as duly served, and the said Daniel A. Gleason, treasurer and receiver general, as aforesaid, entered his appearance as a defendant in said cause at the May rules, A. D. 1881, by his attorneys, George Marston and F. H. Gillett.

117 On the thirtieth day of March, A. D. 1881, the following petition of Peter J. Kelly to be made a party complainant was filed and allowed:

Petition of Peter J. Kelly. [*Filed and Allowed March* 30, 1881.]

Your petitioner, Peter J. Kelly, of the city of Brooklyn, and the county of Kings, and State of New York, respectfully shows unto this honorable court—

First. That he is and has been since the 21st day of March, A. D. 1881, administrator of the estate of the late John Graham, who died leaving goods, chattels, and credits within this Commonwealth to be administered upon; that letters of administration were granted to your petitioner on the said 21st day of March, said letters issuing out of the probate court for the county of Suffolk, in said State of Massachusetts.

Second. That among the personal property of the said John Graham your petitioner finds certain shares of the capital stock of the Boston, Hartford & Erie Railroad Co., being the same corporation referred to and made defendant in an action hereinbefore mentioned, of which stock said deceased was the owner, holder, and possessor at the time of his death, and which ever since has remained unadministered upon and unassigned.

Third. That a suit in equity has been commenced in this court by William F. Graham on his own behalf and on behalf of every stockholder of the said Boston, Hartford & Erie Railroad Co. and other

defendants, and that a bill of complaint has been filed in said action in the office of the clerk of this court, to which bill your petitioner refers as part of this his petition.

Fourth. That your petitioner is desirous of coming in as a party complainant in said suit, as administrator of said John Graham aforesaid upon the goods and chattels as aforesaid of John Graham, deceased, and of taking such steps for the security and protection of his rights as administrator of said deceased stockholder as he may advise, and therefore he applies to this honorable court for leave to so come in, with such other and further order in the premises as to the court may seem just and proper.

And your orator will ever pray.

PETER J. KELLY.

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, City and County of New York, }

Peter J. Kelly, being duly sworn, deposeth and says that he is administrator of John Graham, deceased, and that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein said to be alleged upon information and belief, and as to those matters he believes it to be true.

PETER J. KELLY.

Sworn to before me this twenty-eighth day of March, 1881.

[L. S.] JOHN A. SHIELDS,
U. S. Commissioner, S. D. New York.

118 This cause was thence continued to the May term, A. D. 1881, of this court, when, on the fourth day of June, 1881, the following motion to amend the bill of complaint in this cause was filed, namely:

Motion to Amend Bill of Complaint. [*Filed June* 4, 1881.]

And now your orator comes and moves this honorable court for leave to amend the bill in said cause in manner following, to wit:

On page 28 of the printed bill by striking out the paragraph: "And your orator, upon information and belief, further avers that while said Ellis suit was pending, to wit, in October, 1870, and induced thereto by the proceedings threatened to be taken thereunder, one Adams, claiming to be a creditor to a small amount, petitioned the district court of the United States for the district of Massachusetts that said Boston, Hartford & Erie Railroad Company might be declared bankrupt under the provisions of the bankrupt law of the United States then being, and that all the property, rights, franchises, and privileges might thereunder, and by virtue of said proceedings in bankruptcy, pass to assignees thereafter to be chosen. And such further proceedings were had that on the 2d of March, 1871, an adjudication of involuntary bankruptcy was made, and a decree in due form of law by said district court, and Charles S. Brad-

ley, George M. Barnard, and Charles R. Chapman were appointed assignees, and by a duly executed deed of assignment all the property, franchises, rights, and privileges of said Boston, Hartford & Erie Railroad Company were conveyed to said assignees."

And insert the following in place thereof:

"And your orator, upon information and belief, further avers that while said Ellis suit was pending, to wit, in October, 1870, one Adams, claiming to be a creditor to a small amount, petitioned the district court of the United States for the district of Massachusetts, that said Boston, Hartford and Erie Railroad Company
119 might be declared bankrupt under the provisions of the bankrupt law of the United States then being."

And your orator, upon information and belief, further avers that said Adams was not a creditor in fact of said Boston, Hartford & Erie Railroad Company, but was furnished with certain over-due coupons upon the bonds of the Berdell mortgage, hereinbefore mentioned, by and through the agency of Frederick A. Lane, then president of said Boston, Hartford & Erie Railroad Company, for the purpose of having said Adams represent himself as such creditor, and enable him to make said petition in bankruptcy, the whole matter being part of the fraudulent scheme and conspiracy and the devices hereinbefore set out to get possession of the railroad against the stockholders and creditors of said Boston, Hartford & Erie Railroad Company, and to convert the property thereat to the use of said Lane and his confederates, hereinbefore mentioned, or some of them.

And your orator, upon information and belief, further avers that said coupons were not a debt, provable at the time of said petition, against the estate of said Boston, Hartford & Erie Railroad Company in bankruptcy, and were not such commercial paper as would lay the foundation for such a petition in bankruptcy, in this—

First. That said pretended debt was a certain number of coupons of said bonds, as before stated, which were furnished through the instrumentality of said Lane to said Adams, to appear as a creditor for the purpose of said petition.

Second. That said coupons were not commercial paper, within the meaning of the law, upon which jurisdiction could be founded to present a petition for involuntary bankruptcy, in this: that they were secured by mortgage, and so not provable against the estate without the surrender of the security to the assignee, or a release of the security, neither of which was ever done; and that said debt could not be proved against the estate at the time of the presentation of said petition, nor afterwards, except upon contingencies that could not happen at the time said petition was filed, and did never happen thereafterwards.

Third. That said bonds were never issued by a banker, broker, merchant, trader, manufacturer, or miner, and could not be the foundation for such petition.

Fourth. That the court never made any adjudication thereon, as your orator, upon information and belief, further avers; that when the notice of said supposed proceedings in bankruptcy were served

upon said Boston, Hartford & Erie Railroad Company the directors of said company, duly assembled in a meeting for that purpose, voted to oppose said petition, and to prevent said Boston, Hartford & Erie Railroad Company from being put into bankruptcy. They authorized, instructed, and directed the president of said company to oppose said proceedings in bankruptcy.

120 That thereafterwards said Lane, being president of said company, as aforesaid, reported to said board of directors of said company, at a meeting thereof, that he had employed Hon. B. R. Curtis, in whose legal learning, ability, and integrity of character all had confidence, as counsel, for the purpose of carrying out the vote of the directors in opposing said proceedings in bankruptcy, and for no other purpose whatever; and that no other purpose was in the scope of the power conferred upon said Lane to act in this behalf, which said vote, resolutions, and acts were duly recorded upon the records of the meetings and proceedings of the directors of said company, and have never been cancelled, annulled, or set aside in any way, and no other action in that regard was evr taken by the directors or stockholders of said company.

Nor did the stockholders or board of directors of said company, or any other competent authority, authorize, procure, or consent to, in any manner or form, that the proceedings in bankruptcy should result, terminate, or be carried on so that said company should be put into bankruptcy.

But, to the contrary thereof, said Frederick A. Lane, in furtherance of the conspiracy, combination, and devices hereinbefore mentioned, and as a part thereof, procured the services of J. G. Abbott, Esq., who was at the time counsel of said Lane in fact in the Ellis suit in the supreme court of Massachusetts, herein set forth, to represent the Boston, Hartford & Erie Railroad Company, and consent that a decree of bankruptcy should be declared against said company, which consent is the only foundation of said decree herein, and wholly unauthorized and not agreed to by any person other than said Lane, and he not having authority so to do.

And your orator, upon information and belief, further avers that in truth and in fact said bankruptcy proceeding was a voluntary proceeding on the part of said corporation as represented by the attorney of said Lane, which said proceeding was wholly without law and without authority.

And your orator, upon information and belief, further avers that said proceedings, and the decrees and acts of the court founded thereon, are without jurisdiction, unauthorized and void, and of no effect, and were procured by fraud and collusion in manner aforesaid.

And your orator, upon information and belief, and of his own knowledge, further avers that all notice or knowledge of said proceedings was wholly concealed from him and from said stockholders of said corporation and said board of directors, except that they were told by their said president that there had been a legal adjudication against them in bankruptcy in the proper court of the United States, to which they were bound and obliged to submit, and

121 to which they did submit; and that knowledge of the facts herein set forth in this behalf has — come to your orator, or to any other of the stockholders of said company, as your orator is informed and believes, and therefore avers, until the time that an examination in his behalf of what proceedings had been had was made as part of the prosecution of this suit.

And your orator further prays leave of the court to annex hereto, as part of this bill and an exhibit thereto, a copy of said proceedings in bankruptcy, to which he asks leave to refer, and he does hereby annex the same.

And your orator is advised and believes that he is at liberty and has a right to have this honorable court set aside and hold for naught all said proceedings in bankruptcy, and all effect thereof by which his property in said road and his rights and interests therein and the rights and interests of the other stockholders and creditors have been unlawfully, wrongfully, and fraudulently, and without any fault or laches on his or their part, taken away from him and conveyed to said confederates and others, all whom, he prays, when discovered, may be made parties to said bill.

BENJ. F. BUTLER,
For Comp'ts.

This cause was thence continued to the October term, A. D. 1881, of this court, when, on the twenty-sixth day of October, A. D. 1881, the Honorable Thomas L. Nelson, district judge, sitting, leave was granted to the complainants to file a printed copy of a pamph-
122 let, entitled "Circuit court of the United States, district of Massachusetts. The Boston, Hartford and Erie Railroad Company *vs.* Seth Adams *et al.* Proceedings in bankruptcy"—the same to be treated as annexed to complainant's motion to amend bill of complaint filed June 4, 1881, as the same is stated to be annexed to said motion in the paragraph thereof next to the last.

Leave was also granted to the complainants to file a printed copy of a pamphlet entitled "Commonwealth of Msssachusetts, Suffolk, *ss:* Supreme judicial court. In equity. George Ellis *et als. vs.* Boston, Hartford and Erie Railroad Company *et als.* Proceedings"—the same to be made a part of complainant's bill of complaint,
123 reference having been made thereto in the first paragraph beginning on page 26 of said bill, as follows:

"And your orator further shows that all of said matters and other facts material to the questions herein to be determined will more fully and at large appear, reference being had to the records and decrees made in said several actions brought by the said George Ellis, copies of all which records, decrees, and proceedings your orator prays leave to produce at the hearing of this bill."

Thereupon the complainants filed the two printed pamphlets above referred to, and, the Honorable Thomas L. Nelson, district judge, sitting, the motion to amend bill of complaint filed June 4, 1881, was allowed, and it was ordered that the bill of com-
124 plaint in this cause be taken and considered as amended accordingly.

Thereupon the following demurrers were filed, namely:

Demurrer of Charles S. Bradley et al. [*Filed Nov.* 7, 1881.]

The demurrer of Charles S. Bradley, George M. Barnard, and Charles R. Chapman, defendants, to the amended bill of complaint of William F. Graham and others, as amended by the amendment allowed Oct. 26, A. D. 1881.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiffs' amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said amended bill, and for cause of demurrer show that the plaintiffs have not, in and by their said amended bill, made or stated such a case as entitles them in a court of equity to any discovery from these defendants or either of them, or to any relief against them or either of them, as to the matters contained in the said bill, or any of such matters; and further, that it appears by said bill that this honorable court hath, by reason of the citizenship and nationality of sundry of the parties thereto, no jurisdiction to entertain said bill; and farther, that it appears by said bill that the president and directors of said Boston, Hartford and Erie Railroad Company are necessary parties to this bill, yet that they have not been made parties thereto; and further, that it appears by said amended bill that a creditor of the Boston, Hartford and Erie Railroad Company is a necessary party plaintiff to said bill, yet no creditor is joined as a party plaintiff; and further, that no sufficient cause is shown why this bill should be brought by the plaintiffs and not by the corporation; and further, that said plaintiffs and the class represented by them have been guilty of laches; and further, that it appears by said amended bill that the same is exhibited against these defendants and several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, it appears by said bill, these defendants are not in any manner interested or concerned, and that said bill is altogether multifarious; and further, that it does not appear that the proceedings in bankruptcy therein referred to were had without jurisdic-
125 tion in the district court for the district of Massachusetts; and further, that the allegation that said proceedings were had and procured by fraud and collusion in manner and form as alleged is bad, in that the same is wholly indefinite and lacking in the necessary specifications, so that these defendants cannot be called on to answer the same; and further, that if said proceedings are void this court has no jurisdiction in this suit to set the same aside; and further, that the papers filed as the record of the bankruptcy proceedings do not purport to be the record thereof.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, these defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

By their Attorneys, ROPES, GRAY & LORING.

I, William Caleb Loring, of counsel for the above-named defendants, do certify that the above demurrer, in my opinion, is well founded in point of law.

WILLIAM CALEB LORING.

We, Charles S. Bradley, Charles R. Chapman, and George M. Barnard, on oath declare and say that the above demurrer is not interposed for delay.

CHARLES S. BRADLEY.
GEORGE M. BARNARD.
CHARLES R. CHAPMAN.

126 UNITED STATES OF AMERICA, *District of Massachusetts:*

BOSTON, *November 4th*, 1881.

Personally appeared the above-named George M. Barnard and Charles S. Bradley, and on oath declared and said that the foregoing affidavit by them subscribed is true.

Before me—

[SEAL.] HORACE D. CHAPIN,
Notary Public.

UNITED STATES OF AMERICA, *District of Connecticut:*

HARTFORD, *November* 5, 1881.

Personally appeared the above-named Charles R. Chapman, and on oath declared and said that the foregoing affidavit by him subscribed is true.

Before me—

[SEAL.] ALBERT N. HATHEWAY.
Notary Public.

127 *Demurrer of the New York and New England Railroad Company.*
[*Filed Nov.* 19, 1881.]

The demurrer of the New York and New England Railroad Company, one of the defendants, to the amended bill of complaint of William F. Graham and others, the above-named plaintiffs.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiffs' said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth that the plaintiffs have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery from this defendant or to any relief against it as to the matters contained in the said bill or any of such matters; that it appears by the said bill that the same is exhibited against this defendant and the other defendants thereto for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested or concerned, and that the said bill is multifarious; that there are not proper parties to the said bill, and that there is not and are not any person or persons party or parties to the

said bill who represents or represent all the persons interested in the matters or things to which the said bill relates; that the said bill is filed on behalf of classes of persons which have adverse interests touching the objects of the said bill; that the classes of persons on behalf of which the said bill is filed are not represented by the plaintiffs, or either of them, or by any person or persons party or parties to the said bill; that it appears by the said bill that the plaintiffs and the classes of persons on behalf of which the said bill is filed and the said Boston, Hartford and Erie Railroad Company, and each of them, are and is precluded by laches from claiming any of the relief prayed by the said bill; that the plaintiffs, and each of them, are and is barred from maintaining their said bill by the suit in the supreme judicial court of Massachusetts mentioned in the said bill, and by the proceedings, orders, and decrees in the said suit; that it appears by the document filed by the plaintiffs and referred to in their said bill as part thereof, and as a copy of the proceedings in the said suit in the said supreme judicial court, is not and does not purport to be a copy of the said proceedings in the said suit; that it appears by the document annexed to the said bill and therein referred to as and for a copy of the proceedings in bankruptcy against the said Boston, Hartford and Erie Railroad Company mentioned in the said bill is not and does not purport to be a copy of the said proceedings in bankruptcy, and that it appears by the said bill that this court has not jurisdiction of the said bill or of the mat-
128 ters or things therein contained or of the parties thereto, and there are such parties to the said bill that this court has not jurisdiction of the said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

W. G. RUSSELL,
Counsel for said Defendant.

I certify that in my opinion the foregoing demurrer is well grounded in point of law.

W. G. RUSSELL,
Counsel for the said Defendant.

I, James H. Wilson, president of the said New York & New England Railroad Company, make oath and say that the foregoing demurrer is not interposed for delay.

JAMES H. WILSON.

Sworn to by the said James H. Wilson, at Boston, this 8th day of November, 1881, before me—

[SEAL.] WINSLOW WARREN,
Comm'r of U. S. Cir. C't for Dist. of Mass.

129 *Demurrer of William T. Hart et al.* [*Filed Nov.* 25, 1881.]

The demurrer of William T. Hart and Charles P. Clark, two of the defendants, to the amended bill of complaint of William F. Graham and others, the above-named plaintiffs.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiffs' said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for causes of demurrer show that the plaintiffs have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery from these defendants or either of them, or to any relief against them or either of them, as to the matters contained in the said bill or any of such matters; that it appears by the said bill that the same is exhibited against these defendants and the other defendants thereto for several distinct matters and causes, in many whereof, as appears by the said bill, these defendants are in no way interested or concerned, and that the said bill is multifarious; that there are not proper parties to the said bill, and that there is not and are not any person or persons, party or parties to the said bill, who represents or represent all the persons interested in the matters or things to which the said bill relates; that the said bill is filed on behalf of classes of persons which have adverse interests touching the objects of the said bill; that the classes of persons on behalf of which the said bill is filed are not represented by the plaintiffs or either of them, or by any person or persons, party or parties to the said bill; that it appears by the said bill that the plaintiffs and the classes of persons on behalf of which the said bill is filed, and the Boston, Hartford and Erie Railroad Company, and each of them, are and is precluded by laches from claiming any of the relief prayed by the said bill; that the plaintiffs and each of them are and is barred from maintaining their said bill by their suit in the supreme judicial court of Massachusetts, mentioned in the said bill, and by the proceedings, orders, and decrees in the said suit; that it appears by the document filed by the plaintiffs, and referred to in the said bill as part thereof, and as a copy of the proceedings in the said suit in the said supreme judicial court, is not and does not purport to be a copy of the said proceedings in the said suit; that it appears by the document annexed to the said bill, and therein referred to as and for a copy of the proceedings in bankruptcy against the said Boston, Hartford and Erie Railroad Company, mentioned in the said bill, is not and does not purport to be a copy of the said proceedings in bankruptcy; and that it appears by the said bill that this court has not jurisdiction of the said bill or of the mat-
130 ters or things therein contained, or of the parties thereto, and there are such parties to the said bill that this court has not jurisdiction of the said bill. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and humbly demand judgment of this court whether they shall be compelled to make any further or other answer to the

said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

W. G. RUSSELL,
Counsel for said Defendants.

I certify that in my opinion the foregoing demurrer is well grounded in point of law.

W. G. RUSSELL,
Counsel for the said Defendants.

I, the above-named William T. Hart, make oath and say that the foregoing demurrer is not interposed for delay.

WM. T. HART.

Sworn — by the said William T. Hart at Boston the 23d day of November, 1881, before me—

[SEAL.] FISHER AMES,
United States Commissioner.

131 I, the above-named Charles P. Clark, make oath and say that the foregoing demurrer is not interposed for delay.

CHARLES P. CLARK.

Sworn to by the said Charles P. Clark at the city of New York the ninth day of November, 1881, before me—

[SEAL.] WM. E. BARNETT,
Notary Public, Westch. Co.

Certif. filed in N. Y. Co.

On the second day of January, A. D. 1882, the Honorable Thomas L. Nelson, district judge, sitting, the motion to amend the bill of complaint in this cause filed June 4, 1881, was allowed, and the bill of complaint was amended accordingly as of a date prior to
132 the filing of the several demurrers of defendants, and thereupon the demurrers of Marianne W. Healey and Emily W. Healey, executrices of the will of Mark Healey, filed December 27, 1880; of Charles S. Bradley, George M. Barnard, and Charles R. Chapman, filed November 7, 1881; of the New York and New England Railroad Company, filed November 19, 1881, and of William T. Hart and Charles P. Clark, filed November 25, 1881, were set down for hearing and fully heard on the 2nd, 3rd, 4th, 5th, and 6th days of January, A. D. 1882, by the court, the Honorable Thomas L. Nelson, district judge, sitting.

This cause was thence continued under advisement from
133 term to term to the present October term, A. D. 1882, of this court, when, the Honorable Thomas L. Nelson, district judge, sitting, on the fifteenth day of January, A. D. 1883, the opinion of the court overruling the said demurrers for want of jurisdiction and sustaining said demurrers for want of equity and laches is announced, and on the seventeenth day of February, A. D. 1883, the following final decree is entered, namely:

The demurrers of the defendants, The New York & New England R. R. Co., William T. Hart and Charles P. Clark, trustees; Charles S. Bradley, Charles R. Chapman, and George M. Barnard,
134 assignees, and Marianne W. and Emily W. Healey, executrices of Mark Healey, deceased, came on to be heard, and were argued by counsel at the October term, A. D. 1881, of this court; and this cause having been continued under advisement to this present term, upon consideration thereof, now, to wit, Feb. 17, 1883, it is ordered, adjudged, and decreed that the demurrers of the several defendants be, and the same hereby are, severally allowed; and thereupon it is further ordered, adjudged, and decreed that the bill in this cause be dismissed, and that the plaintiffs, William F. Graham, George J. Carey, Amelia T. Raymond, and Peter J. Kelley, do pay to the defendants, The New York and New England
135 Railroad Company, its costs, taxed at $23.96; and to the defendants, Bradley, Barnard, and Chapman, assignees, their costs, taxed at $23.96; and to the defendants, Hart and Clark, trustees, their costs, taxed at $23.96; and to the defendants, Marianne W. Healey and Emily W. Healey, executrices, as aforesaid, their costs, taxed at $25.94.

From this decree the complainants, William F. Graham and Amelia Teresa Raymond, by their attorney, John Rooney, in open court, claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good; and said appeal is allowed accordingly.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

136 The following is a true copy, a duplicate, of the printed pamphlet entitled "Circuit court of the United States, district of Massachusetts. The Boston, Hartford and Erie Railroad Company *vs.* Seth Adams *et al.* Proceedings in bankruptcy," filed by complainants October 26, 1881, and, by leave of court, to be treated as annexed to complainant's motion to amend bill of complaint filed June 4, 1881, as the same is stated to be annexed to said motion in the paragraph thereof next to the last:

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

THE

BOSTON, HARTFORD AND ERIE RAILROAD

COMPANY,

vs.

SETH ADAMS, et al.

PROCEEDINGS IN BANKRUPTCY.

NEW YORK:
HALLET & BREEN, PRINTERS, 60 FULTON STREET,
1881.

Final Decree. [*February* 17, 1883.]

The demurrers of the defendants, The New York & New England R. R. Co., William T. Hart and Charles P. Clark, trustees; Charles S. Bradley, Charles R. Chapman, and George M. Barnard,
134 assignees, and Marianne W. and Emily W. Healey, executrices of Mark Healey, deceased, came on to be heard, and were argued by counsel at the October term, A. D. 1881, of this court; and this cause having been continued under advisement to this present term, upon consideration thereof, now, to wit, Feb. 17, 1883, it is ordered, adjudged, and decreed that the demurrers of the several defendants be, and the same hereby are, severally allowed; and thereupon it is further ordered, adjudged, and decreed that the bill in this cause be dismissed, and that the plaintiffs, William F. Graham, George J. Carey, Amelia T. Raymond, and Peter J. Kelley, do pay to the defendants, The New York and New England
135 Railroad Company, its costs, taxed at $23.96; and to the defendants, Bradley, Barnard, and Chapman, assignees, their costs, taxed at $23.96; and to the defendants, Hart and Clark, trustees, their costs, taxed at $23.96; and to the defendants, Marianne W. Healey and Emily W. Healey, executrices, as aforesaid, their costs, taxed at $25.94.

From this decree the complainants, William F. Graham and Amelia Teresa Raymond, by their attorney, John Rooney, in open court, claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good; and said appeal is allowed accordingly.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

136 The following is a true copy, a duplicate, of the printed pamphlet entitled "Circuit court of the United States, district of Massachusetts. The Boston, Hartford and Erie Railroad Company *vs.* Seth Adams *et al.* Proceedings in bankruptcy," filed by complainants October 26, 1881, and, by leave of court, to be treated as annexed to complainant's motion to amend bill of complaint filed June 4, 1881, as the same is stated to be annexed to said motion in the paragraph thereof next to the last:

83

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

THE

BOSTON, HARTFORD AND ERIE RAILROAD

COMPANY,

vs.

SETH ADAMS, et al.

PROCEEDINGS IN BANKRUPTCY.

NEW YORK:
HALLET & BREEN, PRINTERS, 60 FULTON STREET,
1881.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY,

v.

SETH ADAMS, as he is a petitioner in Bankruptcy.

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Humbly complaining showeth unto your Honors your orators the Boston, Hartford & Erie Railroad Company, a corporation created under the authority of a law of the State of Massachusetts and owning and operating a railroad in said State.

That heretofore, to wit: on the twenty-first day of October, A. D. 1870, Seth Adams of the town of Newton in the State of Massachusetts, filed in the District Court of the United States for this District, sitting as a Court of Bankruptcy, a petition as a creditor of your orators wherein he alleged that he held certain demands against your orators and that the same were provable against your orator in accordance with the provisions of the Act of Congress entitled "*An Act to Establish a Uniform System of Bankruptcy throughout the United States.*" *Approved March 2nd, 1867*; that your orators had committed divers acts of Bankruptcy therein alleged and prayed that your orators might be declared a Bankrupt and a warrant might be issued to take possession of their estate, that the same might be distributed

according to law, as in and by said petition, to a copy of which hereunto annexed your orators crave leave to refer as a part of this bill, will more fully appear.

And your orators further say that on the second day of November, A. D. 1870, the same being the return day of an order of notice issued out of the said District Court, your orators came before the said Court and appearing for that purpose only moved that Honorable Court to dismiss the said petition, for that they had not jurisdiction to entertain the same and grant the prayer thereof, all of which fully appears by a copy of said motion hereunto annexed to which your orators crave leave to refer as part of this bill.

And your orators further say, that a hearing having been had and the said motion having been argued by counsel, the said Honorable Court did adjudge that they had and would entertain jurisdiction of the said petition and did over-rule the said motion. And thereupon your orators pray that this Honorable Court in the exercise of the jurisdiction conferred upon it by the sixth clause and the second section of the Act of Congress aforementioned will proceed to hear and determine the case and question aforesaid as a Court of Equity and that the said Adams, petitioner, be enjoined from prosecuting the said petition until the further order of this Honorable Court and for such other and further relief as the nature of this case may require and to your Honors shall seem meet.

To the end therefore that the said Adams, petitioner, may if he can show why your orators should not have the relief herein prayed, and may under oath, full, true, and direct, answer make to the premises.

May it please your Honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna to be directed to the said Seth Adams, petitioner, commanding him at a certain penalty therein to be limited, personally to be and appear before your Honors in this Honorable Court, then and there to answer unto this bill and to do and abide by what to your Honors shall seem meet in the premises.

B. R. CURTIS, *of Counsel,*

By WALTER CURTIS,

WALTER CURTIS, *Solicitor.*

CREDITOR'S PETITION.

To the Honorable John Lowell, judge of the District Court of the United States, for the district of Massachusetts:

The petition of Seth Adams, of the town of Newton in the County of Middlesex, and State of Massachusetts, respectfully shows:—That he is a creditor of the Boston, Hartford & Erie Railroad Company a corporation existing under the authority of the laws of the State of Massachusetts and owning and operating a railroad in the States of Massachusetts, Rhode Island, and Connecticut, and owning other property in said States and in the State of New York, and having its principal office, place of business and domicile in said State of Massachusetts and District aforesaid and in Boston in the County of Suffolk therein and having had the same and resided in said District for six months and more before the filing of this petition. That your petitioner's demand is provable against the said Boston, Hartford & Erie Railroad Company, in accordance with the provisions of the Act of Congress, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved March 2, 1867; That he believes that said Boston, Hartford & Erie Railroad Company, owes debts to an amount exceeding the sum of Three Hundred Dollars; That your petitioner's demand exceeds the amount of Two Hundred and Fifty Dollars; and that the nature of your petitioner's demand against the said is as follows:—

Twenty unpaid and overdue coupons or interest warrants for semi-annual interest on the First Mortgage Bonds of the said corporation each of said bonds being for the sum of One Thousand Dollars, and each of said coupons for the sum of Thirty-five Dollars, the aforesaid unpaid coupons the property of your petitioner amounting to the sum of Seven Hundred Dollars, all of the said coupons being due July 1st, A. D. 1870, and now overdue and unpaid.

And your petitioner further represents that within the six calendar months next preceding the date of this petition, the said corporation did commit an act of bankruptcy within the meaning of said Act, to wit, that the said Boston, Hartford & Erie Railroad Company within the period aforesaid and within said District, being insolvent did suffer its property to be taken on legal process in favor of one Ezra G. Perkins, of Hyde Park in the County of Norfolk and State of Massachusetts, a creditor of said corporation, with the intent to give a preference to said Perkins, and with the intent thereby to defeat and delay

the operation of said Act, in this, that said corporation, being insolvent, did on the eleventh day of April, 1870, suffer two passenger cars and one mail express car belonging to said corporation to be seized by a deputy sheriff for the County of Norfolk in said State upon a process of attachment founded upon a writ brought by said Perkins against said Company, dated on said day and returnable at the Superior Court for said County at the term thereof beginning on the fourth Monday of April last past, and the same did not in any manner dissolve but allowed to continue, and upon the return of said writ made no defence thereto but suffered default therein and suffered and allowed the said Perkins to obtain judgment and execution thereupon against said corporation; and thereafterwards said corporation still being and having continued insolvent, at some time in the month of October current, but on which day your petitioner cannot more fully state, did suffer said Sheriff to levy said execution upon the property so attached, to wit, the case aforesaid by a sale thereof pursuant to the statute of said State providing for the sale of property upon execution; with the intent to give a preference to the said Perkins and to defeat and delay the operation of said Act.

And your petitioner further represents that within the period aforesaid, the said corporation did commit an act of bankruptcy in this, to wit, that the said Boston, Hartford & Erie Railroad Company within the period aforesaid, and within said District of Massachusetts, to wit, on the day of , being bankrupt did suffer its property to be taken on legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of said State of Massachusetts and returnable to said Court for the County of Middlesex on the third Tuesday of October current in favor af the Merchants' National Bank of Lowell in said State and District of Massachusetts a creditor of said corporation, and has not at any time since in any manner dissolved said attachment, but has since suffered and allowed the same to remain, with intent to give a preference to said Merchants' National Bank and to defeat and delay the operation of said Act.

And your petitioner further represents that within the period aforesaid and within said district, to wit, on the fifteenth day of May, A. D. 1870, said Company being a merchant and trader, fraudulently stopped and suspended payment of its commercial paper and did not within a period of fourteen days thereafter resume, and has not since resumed, the payment of the same, in this that the said corporation on said fifteenth day of May was indebted in the sum of Two Thousand Dollars upon a piece of commercial paper, to wit, a promissory note, for the

sum of Two Thousand Dollars aforesaid, dated February 12, 1870, and due on said fifteenth day of May, payable to the order of Messrs. Bond & Ward, and that said Company did not pay the same on said fifteenth day of May, but fraudulently stopped and suspended payment thereof and has not since resumed the same, and has not since paid said note.

And your petitioner further represents that within the period aforesaid and within said district, to wit, on the twenty-ninth day of August, A. D. 1870, said Company being a merchant and trader, fraudulently stopped and suspended payment of its commercial paper and did not within a period of fourteen days thereafter resume, and has not since resumed, the payment of the same, in this that the said corporation on said twenty-ninth day of August was indebted in the sum of Fourteen Hundred and Forty-nine Dollrrs and ninety-seven cents, upon a piece of commercial paper, to wit, a promissory note for the sum of Fourteen Hundred and Forty-nine Dollars and ninety-seven cents, dated April 26th, 1870, and due on said twenty-ninth day of August, payable to the order of said corporation and by the said corporation endorsed, a copy of which is hereto annexed marked A, and the said Company did not pay the same on said twenty-ninth day of August, but fraudulently stopped and suspended payment thereof and has not since resumed the same.

And your petitioner further represents that within the period aforesaid the said corporation did commit an act of bankruptcy in this, to wit, that the said Boston, Hartford & Erie Railroad Company within the period aforesaid and within said District of Massachusetts, being insolvent did suffer its property to be taken on legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of said State of Massachusetts and returnable to said Court for the County of Suffolk, in favor of Edward Haynes of Boston in said District of Massachusetts, with the intent to give a preference to said Edward Haynes and to defeat and to delay the operation of said Act, which said seizure upon attachment was made on the ninth day of March, 1870, and has ever since continued and said corporation has allowed and suffered the same to continue for the period of six months now last past.

And your petitioner further represents that within the period aforesaid the said corporation did commit an act of bankruptcy in this, that said corporation within said period and within said District, being insolvents did suffer its property to be taken upon legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of

said State of Massachusetts and returnable to said Court for the County of Suffolk in favor of Sidney Dillon of the City and State of New York with the intent to give a preference to the said Dillon and to defeat and delay the operation of said Act, which attachment and seizure was made in the month of March now last past and has ever since continued and said corporation has suffered and allowed the same to continue undissolved for the period of six months now last past.

And your petitioner further represents that within the period aforesaid the said corporation did commit an act of bankruptcy in this, that said corporation within said period and within said District, being insolvent, did suffer its property to be taken on legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of said State and returnable to the said Court for the County of Suffolk, in favor of Robert F. Clark and John C. Jones of Boston in said State, with the intent to give a preference to said Clark and Jones and to defeat and delay the operation of said Act, which said seizure and attachment was made in the month of March now last past and has ever since continued. and said corporation has allowed and suffered the same to continue undischarged for the six months now last past.

And your petitioner further represents that within the period aforesaid the said corporation did commit an act of bankruptcy in this, that said corporation within said period and within said District, being insolvent, did suffer its property to be taken on legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of said State and returnable to the said Court for the County of Suffolk, in favor of Lewis Broad, Lewis P. Broad, and William H. Ward, copartners under the firm of Broad & Ward, with the intent to give a preference to said Broad & Ward and to defeat and delay the operation of said Act, which said seizure and attachment was made in the month of April now last past and has since continued, and said corporation have suffered and allowed the same to continue for the period of six months now last past.

And your petitioner further represents that within the period aforesaid the said corporation did commit an act of bankruptcy in this, to wit, that the said corporation did within said District and in the month of July now last past, being insolvent, suffer its property to be taken on legal process, to wit, upon a writ of attachment issued from the Supreme Judicial Court of said State of Massachusetts and returnable into said Court for the County of Suffolk, in favor of the said Sidney Dillon, with the intent to give to the said Dillon a preference and to

defeat and delay the operation of said Act, which said attachment said corporation has ever since allowed to remain upon said property undissolved.

And your petitioner further represents that within the period aforesaid said corporation did commit an act of bankruptcy in this, to wit. that within said District in the month of July now last past, said corporation, being insolvent, did suffer its property to be taken upon legal process, to wit, upon a writ of attachment issued from the Superior Court of the State of Massachusetts, returnable to said Court for the County of Suffolk, in favor of Charles E. Powers of said Boston, with the intent to give a preference to said Powers and to defeat and delay the operation of said Act, which said attachment said corporation has ever since allowed to remain upon said property undissolved.

And your petitioner further shows to your Honor that in the month of July now last past, George M. Bartholomew, Thomas W. Pierce, —— —— Oliphant, —— —— Converse and James Graham Gardner were by decrees of the proper judicial tribunals in the several States of Massachusetts, Rhode Island, connecticut and New York, appointed receivers of the property and assets of the said corporation, and that the said Receivers in violation of their duties as such Receivers, and in fraud of the rights of your petitioner and the other creditors of the said corporation, either have made or are making in connection with, and with the corporation and consent of the President, Directors, and other officers of the said corporation, a wastefnl and fraudulent contract with one N —— C. Munson, a contract for the performance of work on an unfinished portion of the railroad of said corporation, whereby they, said Receivers and corporation, undertake and agree to dispose of the property and earnings of the said corporation, which should belong to, and be used to pay your petitioners and other creditors of the said corporation to the said N —— C. Munson, and to issue to him certain certificates of indebtedness to a much larger amount than the cost and value of the work to be done by him ; and to make the said certificates a preferred lien on the railroad, property, business and earnings of the said Company, in fraud of the Bankrupt Law of the United States, and of the rights and interest of your petitioner and other creditors of the said corporation in its property and earnings.

Wherefore, your petitioner prays that the said corporation, its President, Directors, Officers and Managers, and the said Receivers aforesaid, may all and singular be enjoined from making or executing the said contract, or from issuing any certificates of indebtedness thereunder,

or from taking any steps or doing any act thereunder, or in relation thereto, or from disposing of any property of the said corporation, or making or suffering any new incumbrance thereon, and that the said Munson may be likewise enjoined from making or executing the said contract, or doing any work or receiving any certificates of indebtedness, or creating or attempting to create any debt or liability of the said corporation thereunder or with reference to the same.

Wherefore, your petitioner prays, that the said Boston, Hartford & Erie Railroad Company may be declared a Bankrupt, and that a Warrant may be issued to take possession of his Estate; that the same may be distributed according to law; and that such further proceedings may be had thereon as the law in such case prescribes.

SETH ADAMS, *Petitioner.*

LATHROP & BISHOP and A. LINCOLN,
Attorneys.

United States of America, } *ss.*
District of Massachusetts. }

I, Seth Adams, the Petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by me are true, so far as the same is stated of my own knowledge, and that those matters which are stated therein on information and belief, are true according to the best of my knowledge, information and belief.

SETH ADAMS, *Petitioner.*

Subscribed and sworn to before me, }
this 21st day of October, A. D. 1870. }

S. LATHROP THORNDIKE,
Register in Bankruptcy.

I, Deputy Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the original Creditor's Petition on file in the office of the Clerk of said Court.

In witness whereof, I have hereunto subscribed my name
[L. S.] and affixed the seal of the said Court this 13th day of May, A. D., 1881.

F. S. FISKE,
Deputy Clerk.

United States of America, }
District of Massachusetts. } *ss.*

In the matter of the Boston, Hartford and Erie Railroad, against whom a petition in Bankruptcy has this day been filed.

I, Seth Adams, petitioning creditor, do solemnly depose and say that the said Boston, Hartford and Erie Railroad is and has been since July 1st, A. D. 1870, justly and truly indebted to your petitioner in the sum of seven hundred dollars, being the amount of twenty coupons, interest warrants, or promissory notes of the said Railroad Company, given for the interest due on the said first day of July, A. D. 1870, upon Twenty Test Mortgage Bonds of the said Company, each of the said Bonds being for the sum of One Thousand Dollars, each of the said coupons for the sum of Thirty-Five Dollars; and the said Railroad Company in each of the said coupons promising to pay to the bearer thereof on the first day of July, A. D. 1870, the sum of thirty-five dollars. Your petitioner being on the said first day of July the holder of the said twenty coupons, and still holding the same, and the said coupons being all overdue and unpaid.

SETH ADAMS.

DISTRICT OF MASSACHUSETTS, *ss.*

BOSTON, Oct. 21st, A. D. 1870.

This day personally appeared before me at Boston, in said district, Seth Adams, the above named affiant and petitioning creditor, and in my presence subscribed the foregoing affidavit and made oath that the same was true.

S. LATHROP THORNDIKE,
Register in Bankruptcy.

I, Deputy Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the original on file in the office of the Clerk of said Court.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said Court this 13th day of May, A. D. 1881.

F. S. FISKE,
Deputy Clerk.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS, *ss.*

THE HARTFORD AND ERIE RAILROAD COMPANY,

vs.

SETH ADAMS, *et als.*

And now it is agreed by the parties that the bill in the said case may be withdrawn.

WALTER CURTIS,
for the Plaintiff.

LATHROP & BISHOP,
for the Respondent.

DISTRICT OF MASSACHUSETTS.

IN BANKRUPTCY.

SETH ADAMS,
Petition in Bankruptcy, 1881,

vs.

THE BOSTON, HARTFORD AND ERIE RAILROAD.

And now the respondents assent to an adjudication of bankruptcy against them.

J. G. ABBOT,
Att'y for Respondents.

To the Honorable the Judges of the Circuit Court of the United States within and for the District of Massachusetts, sitting in Equity:

Respectfully represents your petitioner Enoch G. Sweatt, of Woonsocket in the District of Rhode Island, that he is a creditor of the Boston, Hartford and Erie Railroad Company, a corporation duly established by law in the States of Massachusetts, Rhode Island, Connecticut and New York, and owning and operating a railroad in said states; that he is a creditor of said corporation on two certain promissory notes amounting to the sum of three thousand seven hundred and fifty-five dollars and seven cents, and that he is also the owner of the bonds of said corporation (known as the "Berdell Mortgage Bonds") to the amount of seventy thousand dollars; that on the twenty-first day of October last past, Seth Adams of Newton, in said state of Massachusetts, a creditor of said company filed in the District Court of the United States, for the District of Massachusetts, a petition alleging that said company had committed divers acts of bankruptcy within the meaning of the act of Congress, entitled An Act to establish a Uniform System of Bankruptcy throughout the United States, approved March 2, 1867, and praying that said company might be declared bankrupt, (a copy of which petition is hereto annexed marked "A") which your petitioner prays may be taken as part of this petition; that on the return day of the notice issued thereon, to wit: on the second day of November last, said company appeared by its counsel and moved that said proceedings be dismissed for want of jurisdiction, a copy of which said motion marked "B," is annexed and made part hereof; that a hearing being had, it was held that said Court had jurisdiction in the premises, and said company was on the second day of March instant, adjudged bankrupt on said petition.

And your petitioner further shows: that on the twenty-third day of December last, said company filed a bill in Equity, in this Court, praying that this Court would exercise the powers conferred upon it, by the second section of said Act of March 2d, 1867, and enjoin said Adams from further proceedings in the premises until the further order of this Court, and for other relief, but that on the twenty-eighth day of February last, said bill in Equity was withdrawn by agreement, all which by the record thereof in this Court remaining, will more fully appear.

And your petitioner further says: that he believed and had good reason to believe that said company would proceed with its said suit in Equity, that the same was withdrawn without his knowledge, and that he has but just been acquainted with the fact of said withdrawal.

And your petitioner further states that he is greatly aggrieved in his rights as creditor of said company, and as bond holder therein as afore-

said, by the decision of said Court to entertain jurisdiction of said petition, and in adjudging said company bankrupt, and insists that said Court had no jurisdiction to adjudge said company bankrupt, and prays this honorable Court to revise the decision aforesaid, and reverse the same.

To the end, therefore, that all proceedings under said Adams's petition may be stayed until the further order of this honorable Court, and that an injunction may be issued against all persons whomsoever, and especially against said Adams and all other creditors of said corporation and against said corporation, and against S. Lathrop Thorndike, Esquire, one of the Registers in Bankruptcy of said District Court, and all other registers in bankruptcy of said District Court, and against any and all persons who may claim or appear to have been appointed assignees of said corporation, forbidding them or any of them to do any acts or things under said petition, and that your petitioner may have such other and further relief in the premises as to your Honors shall seem meet.

May it please your Honors to grant unto your petitioner not only a writ of injunction conformably to the prayer of this petition, but also a writ of subœpna to be directed to the above named respondents and commanding them and every of them personally to be and appear before this Honorable Court, there to show cause, if any they have, why the prayer of your petitioner should not be granted.

ENOCH G. SWEATT.

CONVERSE & KELLY,
Solicitors for Petitioners.

United States of America, }
District of Massachusetts. } *ss.*

At Boston on this eighteenth day of March, A, D., 1871, personally appeared the petitioner Enoch G. Sweatt, and made oath that the statements by him subscribed in the foregoing petition are true.

Before me, JOHN G. STETSON,
Notary Public.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS,

IN BANKRUPTCY.

In the matter of the Boston, Hartford and Erie Railroad Corporation, a Corporation created by a law of the State of Massachusetts.

And now on the return day of the notice issued upon the petition

in the matter aforesaid, the said Corporation comes and appearing for this purpose only, moves this Honorable Court to dismiss the said petition, for that this Honorable Court has not jurisdiction to entertain the same and grant the prayer thereof.

By B. R. CURTIS,
Attorney and Counsel.

I, Edward Dexter, Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing motion is a true copy of the original on file in said clerk's office.

In witness whereof, I have hereunto subscribed my
[L. S.] name and affixed the seal of the said Court this eighteenth day of March, A. D. 1871

EDWARD DEXTER,
Clerk.

DISTRICT OF MASSACHUSETTS.

IN BANKRUPTCY.

March 1, 1871.

SETH ADAMS, *petitioner*, *vs.*, THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY,

And now the respondents assent to an adjudication of bankruptcy against them.

J. G. ABBOT,
Att'y for Respondents.

I, Edward Dexter, Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing assent is a true copy of the original on file in said clerk's office.

In witness whereof, I have hereunto subscribed my
[L. S.] name and affixed the seal of the said Court, this eighteenth day of March, A. D. 1871.

EDWARD DEXTER,
Clerk.

I, Enoch G. Sweatt, of Woonsocket in the State of Rhode Island, on oath depose and say, that I am a creditor of the Boston, Hartford and Erie Railroad Company (a corporation established by law in the States of Massachusetts, Rhode Island, Connecticut and New York, and own-

ing and operating a railroad in said States, and that I am also the owner of the bonds of said corporation (known as the Berdell mortgage bonds) to the amount of seventy thousand dollars, and also of one hundred and fifty shares in the capital stock of said corporation, the certificate of which was issued to me, and bears date the twelfth day of December, A. D. 1866; that on the twenty-first day of October last past, Seth Adams, of Newton in said State of Massachusetts, a creditor of said company, filed in the District Court of the United States for the District of Massachusetts a petition alleging, that said company had committed divers acts of bankruptcy within the meaning of the Act of Congress, entitled an Act to establish a uniform system throughout the United States, approved March 2, 1867, and praying that said Company might be declared bankrupt (a copy of which petition marked "A" is annexed to my petition filed in the Circuit Court on the eighteenth day of March instant); that on the return day of the notice issued on said petition, to wit, on the second day of November last past, said company appeared by its counsel and moved, that said proceedings be dismissed for want of jurisdiction (a copy of which said motion marked "B" is annexed to my aforesaid petition) that a hearing was had before his Honor Judge Shipley, sitting as a judge of the said District Court, who rendered his decision on the eighteenth day of December last past, that said District Court had and would entertain jurisdiction of the said petition of said Adams; that on the twenty-third day of December last past, said corporation filed a bill in equity in the Circuit Court of the United States for the District of Massachusetts, appealing from said decision and praying that the said Circuit Court would exercise the powers conferred upon it by the first clause of the second section of the Bankrupt Act aforesaid; that on the twenty-eight day of February last past, an agreement to withdraw said bill in equity was filed in said Circuit Court (a copy of which agreement, together with a copy of which bill are hereto annexed, with the certificate of the Clerk of said Court); that on the first day of March instant, said corporation by its counsel, J. G. Abbot, filed in the said District Court an assent to an adjudication of bankruptcy against it (a copy of which is annexed to my said petition), and on the second day of March instant, said corporation was adjudged bankrupt by said District Court; that I was aware of said decision of said District Court at or about the time the same was made, and also that an appeal had been taken therefrom by said company at the time the same was taken or immediately thereafter; that I believed that the officers of said corporation would faithfully represent the rights and interests of all parties interested in the decision of the important question of jurisdiction raised by said bill and would prosecute the same to a final

decree of said Circuit Court after full hearing and argument upon said question, and that I believe if the company had not taken said appeal, that I or other parties having like interests would have taken an appeal from said decision; and that the sole reason why such appeal was not taken by myself or others, was that all parties relied upon the intentions of the managers of said company to secure the opinion or decision of his Honor Judge Clifford on the question of jurisdiction; that I had no knowledge of the filing of the said agreement to withdraw said bill, until the fifteenth of March instant, when I immediately retained counsel and caused my petition to be prepared, to the Circuit Court with all possible dispatch for transmission to Washington for presentation there to his Honor, Judge Clifford, and applied to the Clerk's Office of said Circuit Court with my petition to file the same at half-past four o'clock in the afternoon of said day, when I found the office closed for the day, and was therefore unable to file the same; that I transmitted said petition to Washington in the evening of said day by mail for the purpose aforesaid; that I was unable to procure copies of the proceedings aforesaid in season to send forward with said petition; that I subsequently, on receipt of a telegram from Washington, on Friday the seventeenth of March instant, in reply to counsel's letter in reference to said petition, caused a new petition to be prepared with the proper copies annexed and filed the same in the Circuit Court on the eighteenth day of March instant, setting forth substantially the same facts and reasons contained in the petition transmitted to Washington; that I have since used all proper and reasonable diligence to present the said petition filed on the eighteenth instant, to his Honor Judge Clifford (having caused the same with copies annexed to be sent forward by mail on Monday, the twentieth day of March instant, which owing to the return of the gentleman from Washington (to whom they were sent and by whom they were to be presented to his Honor, Judge Clifford) were sent back again to Boston where they arrived on the twenty-fourth of March instant; that I did not receive notice of the said adjudication of bankruptcy, until I received the same by mail, postmarked at Boston on the tenth of March instant, and that I was the owner of said notes and bonds at the time of the filing of said Adams petition, and have been ever since.

ENOCH G. SWEATT.

United States of America, }
District of Massachusetts. } *ss.*

Subscribed and sworn to before me,

[L. S.] C. W. TUTTLE,

U. S. Commissioner.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS,

IN EQUITY.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, *v.* SETH ADAMS, as he is petitioner in Bankruptcy.

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

Humbly complaining showeth unto your Honors your orators the Boston, Hartford and Erie Railroad Company, a corporation created under the authority of a law of the State of Massachusetts, and owning and operating a railroad in said State.

That heretofore, to wit, on the twenty-first day of October, A. D. 1870, Seth Adams, of the town of Newton, in the State of Massachusetts, filed in the District Court of the United States for this district sitting as a Court of Bankruptcy, a petition as a creditor of your orators, wherein he alleged that he held certain demands against your orators, and that the same were provable against your orators in accordance with the provisions of the act of Congress, entitled "An Act *to Establish a Uniform System of Bankruptcy throughout the United States," approved March* 2d, 1877; that your orators had committed divers acts of bankruptcy therein alleged, and prayed that your orators might be declared a Bankrupt and a warrant might be issued to take possession of their estate that the same might be distributed according to law, as in and by said petition, to a copy of which hereunto annexed your orators crave leave to refer as a part of this bill, will more fully appear. And your orators further say that on the second day of November, A. D. 1870, the same being the return day of an order of notice issued out of the said District Court, your orators came before the said Court, and appearing for that purpose only, moved that Honorable Court to dismiss the said petition for that they had not jurisdiction to entertain the same and grant the prayer thereof, all of which fully appears by a copy of said motion hereunto annexed to which your orators crave leave to refer as part of this bill.

And your orators further say that a hearing having been had and the said motion having been argued by counsel, the said Honorable Court did adjudge that they had and would entertain jurisdiction of the said petition and did overrule the said motion. And thereupon your orators pray that this Honorable Court in the exercise of the jurisdiction conferred upon it by the sixth clause and the second section of the Act of Congress aforementioned, will proceed to hear and determine the case and question aforesaid as a Court of Equity, and that the said Adams petitioner be enjoined from prosecuting the said peti-

tion until the further order of this Honorable Court and for such other and further relief as the nature of this case may require and to your Honors shall seem meet.

To the end therefore that the said Adams, petitioner, may if he can show why your orators should not have the relief herein prayed and may under oath full, true and direct answer make to the premises.

May it please your Honors to grant unto your orators, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna to be directed to the said Seth Adams petitioner, commanding him at a certain time and under a certain penalty therein to be limited personally to be and appear before your Honors in this Honorable Court then and there to answer unto this bill and to do and abide by what to your Honors shall seem meet in the premises.

B. R. CURTIS, *of Counsel.*
By WALTER CURTIS.

WALTER CURTIS, *Solicitor.*

UNITED STATES OF AMERICA, }
MASSACHUSETTS DISTRICT, } *ss.*

I, John G Stetson, Clerk of the Circuit Court of the United States for the first Circuit and District of Massachusetts, certify that the foregoing is a true copy of a Bill in Equity (not including copies annexed to said Bill and referred to in said Bill) filed in the Clerk's office on the twenty-third day of December, A. D. 1870, and I further certify that on the twenty-eighth day of February, A. D. 1871, an agreement was filed in said Clerk's office in the words following, namely:

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS, *ss.*

THE HARTFORD AND ERIE RAILROAD COMPANY *v.* SETH ADAMS ET ALS.

And now it is agreed by the parties that the bill in the said case may be withdrawn.

WALTER CURTIS, *for the Plaintiffs.*
LATHROP & BISHOP, *for the Defendants.*

And I further certify that since the filing of said agreement no further proceedings have been had in said cause in said Circuit Court.

Witness my hand and the seal of said Court at
[L. S.] Boston, this twentieth day of March, A. D. 1871.
JOHN. G. STETSON, *Clerk.*

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UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, } *ss.:*

In the matter of the Boston, Hartford and Erie Railroad, against whom a petition in bankruptcy has this day been filed.

I, Seth Adams, petitioning creditor, do solemnly depose and say, that the said Boston, Hartford and Erie Railroad is, and has been since July 1st, A. D. 1870, justly and truly indebted to your petitioner in the sum of seven hundred dollars, being the amount of twenty coupons, interest warrants, or promissory notes of the said Railroad Company, given for the interest due on the said first day of July, A. D. 1870, upon twenty First-Mortgage Bonds of the said company, each of the said bonds being for the sum of one thousand dollars, each of the said coupons for the sum of thirty-five dollars; and the said Railroad Company in each of the said coupons promising to pay to the bearer thereof on the first day of July, A. D. 1870, the sum of thirty-five dollars. Your petitioner being on the said first day of July the holder of the said twenty coupons, and still holding the same, and the said coupons being all overdue and unpaid.

SETH ADAMS.

DISTRICT OF MASSACHUSETTS, *ss.:*

BOSTON, Oct. 21st, A. D. 1870.

This day personally appeared before me, at Boston, in said District, Seth Adams, the above named affiant and petitioning creditor, and in my presence subscribed the foregoing affidavit, and made oath that the same was true.

S. LATHROP THORNDIKE,
Register in Bankruptcy.

I, Deputy Clerk of the District Court of the United States, for the District of Massachusetts, hereby certify that the foregoing is a true copy of the original affidavit on file in the office of the Clerk of said Court.

[L. S.] In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Court this 12th day of July, A. D. 1881.

ELISHA BASSETT,
Deputy Clerk.

UNITED STATES DISTRICT COURT.

MASSACHUSETTS DISTRICT, *ss.*

October 27th, 1870.

IN RE SETH ADAMS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, AN ALLEGED BANKRUPT.

And now comes your petitioner and moves to amend his petition by adding thereto the following:

AMENDMENT.

And your petitioner further says, that the said Boston, Hartford and Erie Railroad Company being bankrupt and insolvent, heretofore and before the filing of the petition in this cause, suffered its property and estate to be taken on legal process with intent to give a preference to one or more of its creditors, and with the intent thereby to defeat and delay the operation of the bankrupt law of the United States: in this, to wit, that on the second day of August, A. D. 1870, in a suit in Equity, then pending in the Supreme Judicial Court for the Commonwealth of Massachusetts, in the County of Suffolk, wherein George Ellis, et al., are complainants and the said Boston, Hartford and Erie Railroad Company is defendant, it suffered and consented to the making and entering of a decree in said cause whereby Receivers were appointed of all and singular the railways and all the other property whatsoever of the Boston, Hartford and Erie Railroad Company and of all its income and earnings; and whereby the said Receivers were also authorized to pay and discharge out of any moneys that should be in their hands as such Receivers, any sums due from said Boston, Hartford and Erie Railroad Company for labor performed after the first day of June, A. D. 1870, in operating its road, or supplies or materials furnished the said company after that day for operating its road, including all salaries due or payable by said company to its officers, for services performed by them for said company since said first day of June, and also such sums, not exceeding three thousand dollars, as should be necessary to obtain possession of any books or papers of said company; with the intent on the part of the said corporation to give a preference to the creditors of the said company to whom such sums might be due for labor, materials, supplies or salaries in fraud of the Bankrupt Laws of the United States and to defeat and delay the operation of the said laws, and that thereupon the said decree was passed, and the said Receivers entered into and took possession of the railways and other property and assets of the said corporation, and have ever since continued to hold possession of the same.

And also in this, to wit, that on the tenth day of August, A. D. 1870, in a suit in Equity then pending in the Superior Court of the State of Connecticut, in the County of Hartford, wherein George Ellis is complainant and the said Boston, Hartford and Erie Railroad Corporation is defendant, it suffered and consented to the making and entering of a like decree, whereby Receivers were appointed of all and singular the railways of said company in the State of Connecticut, and of all the other property whatever of the Boston, Hartford and Erie Railroad Company, and of all its income and earnings; and whereby the said Receivers were also authorized to pay and discharge out of any moneys that should be in their hands, as such Receivers, any sums due from said Boston, Hartford and Erie Railroad Company, for labor performed after the first day of June, A. D. 1870, in operating its road or supplies or materials furnished the said company after that day for operating its road, including all salaries due or payable by said company to its officers, for services performed by them for said company since said first day of June, and also such sums, not exceeding three thousand dollars, as should be necessary to obtain possession of any books or papers of said company; with the intent on the part of the said corporation to give a preference to the creditors of the said company to whom such sums might be due for labor, materials, supplies or salaries, in fraud of the Bankrupt Laws of the United States, and to defeat and delay the operation thereby of the said laws, and that thereupon the said decree was passed.

SETH ADAMS.

UNITED STATES OF AMERICA, }
DISTRICT OF MASSACHUSETTS, } *ss.:*

I, Seth Adams, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing amendment subscribed by me are true, so far as the same is stated of my own knowledge, and that these matters which are stated therein on information and belief, are true according to the best of my knowledge, information and belief.

SETH ADAMS,
Petitioner.

Subscribed and sworn to, October 29th, 1870, before me.

S. LATHROP THORNDIKE,
Register in Bankruptcy.

I, Deputy Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the original amendment on file in the office of the Clerk of said Court.

In witness whereof, I have hereunto subscribed my [L. S.] name and affixed the seal of the said Court this 12th day of July, A. D. 1881.

ELISHA BASSETT,
Deputy Clerk.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, } *ss.:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Boston, Hartford and Erie Railroad Company, its President, Directors, Officers, Agents, Managers and servants, and every of them, and Norman C. Munson, his representatives, attorneys, agents and servants,

GREETING:

Whereas Seth Adams has filed his petition in bankruptcy in the District Court in the District of Massachusetts against the said corporation, praying among other things that you and every of you be enjoined as in said petition appears, and whereas upon said petition, an order of notice issued and it was also ordered that the said Boston, Hartford and Erie Railroad Company, its President, Directors, officers, agents, managers, and servants, and every of them be and they are hereby enjoined and restrained from making or executing any contract or agreement for the performance of any work, or any unfinished portion of the railroad of said company. and from creating any new debt or liability of the said company, and from making or issuing any certificate of indebtedness under any such contract or for the performance of any such work, and from in any wise disposing of, or creating or suffering any incumbrance or lien upon the railroad of said corporation, or any portion of it, or its business or earnings, or property under or by virtue of such contract or for the performance of any such

work, and from doing any other act under or in relation to any such contract, or the performance of any such work; and that Norman C. Munson, his representatives, attorneys, agents, and servants, and every of them be and they hereby are likewise enjoined and from making or executing any such contract with the said Boston, Hartford and Erie Railroad Company, its President, Directors, officers, managers, agents, or any of them, and from receiving any certificates of indebtedness, or performing any work, under or in pursuance of any such contract, or upon any unfinished portion of said railroad; and from creating any liability on the part of said corporation or any incumbrance or lien upon the said railroad or any part of it, or any other property of the said corporation, its business or earnings under or by virtue of any such contract, or for the performance of any work upon any unfinished portion of said railroad. Now, therefore, in consideration thereof, you are each and every of you enjoined and restrained from and immediately after the receipt and notice of this our writ, in conformity with the terms of said order, and we do hereby enjoin and command you and each and every of you that you refrain from doing any act or thing in violation of, or infringement of said order, otherwise prohibited.

Witness the Honorable George F. Shepley, Judge of the Circuit Court of the United States for the First Circuit, the Honorable John Lowell, Judge of said District Court being disabled from acting in said cause, and the seal of said District Court, at Boston, this twenty-second day of October, in the year of our Lord eighteen hundred and seventy.

[L. S.]

EDWARD DEXTER,
Clerk of the District Court for said District.

UNITED STATES OF AMERICA, }
MASSACHUSETTS DISTRICT, } *ss.:*

BOSTON, October 29th, 1870.

I hereby certify that on the 22nd day of October inst. I gave notice of the issuing of the within injunction by delivering in hand to the within named Norman C. Munson a true and attested copy of this writ. I also gave in hand to M. E. Ingalls, the clerk of the within named Boston, Hartford and Erie Railroad Company, a like attested

copy of this writ. I also gave in hand to Henry L. Hallett and to James C. Converse, two of the Directors of said company, each a like attested copy of this writ, and on the 24th day of the same October I gave in hand a like copy to J. W. Pierce, and on the 26th day of the same October I gave a like copy in hand to George M. Bartholomew, and on the same day I gave a like copy in hand to Frederick A. Lane, the President of said company.

GEO. L. ANDREWS,
U. S. Marshal.

I, Deputy Clerk of the District Court of the United States for the District of Massachusetts, hereby certify that the foregoing is a true copy of the original injunction on file in the office of the Clerk of said Court.

[L. S.] In witness whereof I have hereunto subscribed my name and affixed the seal of the said Court this 12th day of July, A. D. 1881.

ELISHA BASSETT,
Deputy Clerk.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

WILLIAM F. GRAHAM *et al.*, *against* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, *et al.*

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss.:*

William M. Denman, being duly sworn, says: That he is the Secretary of the Boston, Hartford and Erie Railroad Company, and has charge of the records of the said Company.

That in and by said records it appears that at a meeting of the Board of Directors of said company held in Boston on the first day of November, 1870: "The President proceeded to read an injunction "order issued by the U. S. District Court for the District of Massa- "chusetts, in Bankruptcy, against the President, Directors, agents, "&c., of the Boston, Hartford and Erie Railroad Company and others, "on a petition filed by Seth Adams, order dated October 22nd, 1870.

"On motion it was voted to oppose the above proceedings on the "part of the corporation and its officers by all legal means.

"On motion it was resolved, that the matter of opposing said pro- "ceedings in bankruptcy be referred to the President with power."

That at a meeting of said Board of Directors held on the 30th day of November, 1870, "The President reported in reference to the bank- "ruptcy proceedings, that he had retained Hon. B. R. Curtis in "behalf of the company."

Deponent further says that the foregoing resolutions and transactions of the said Board of Directors have never been annulled, altered or amended. That there is no authority contained in said records or any vote or resolution by the stockholders of said company or by its Board of Directors that consent be given to put the Boston, Hartford and Erie Railroad in bankruptcy, or accepting any adjudication of bankruptcy.

WM. M. DENMAN.

Sworn to before me this }
26th day of May, 1881. }

JOSEPH GUTMAN, JR.,
United States Commissioner S. D., N. Y.

162 The following is a true copy—a duplicate—of the printed pamphlet, entitled "Commonwealth of Massachusetts, Suffolk, *ss:* Supreme judicial court. In equity. George Ellis *et als. vs.* Boston, Hartford and Erie Railroad Company *et als.* Proceedings," filed by complainants October 26th, 1881, and by leave of court made a part of complainants' bill of complaint, reference having been made thereto in the paragraph of said bill, reading as follows:

"And your orator further shows that all of said matters and other facts material to the questions herein to be determined will more fully and at large appear, reference being had to the records and decrees made in said several actions brought by the said George Ellis, copies of all which records, decrees, and proceedings your orator prays leave to produce at the hearing of this bill."

Commonwealth of Massachusetts,

SUFFOLK,—ss.

SUPREME JUDICIAL COURT.

IN EQUITY.

GEORGE ELLIS, et als.

vs.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, et als.

PROCEEDINGS.

NEW YORK:
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COPY.

To the Honorable the Justices of the Supreme Judicial Court in and for the County of Suffolk in the Commonwealth of Massachusetts.

Respectfully represent unto your Honors, George Ellis of the City, County and State of New York, and Matthew Bolles and Michael S. Bolles, both of Boston, in said County of Suffolk, and both copartners under the firm and style of Matthew Bolles & Company, all of whom bring this their bill of complaint in their own behalf and in behalf of such holders and owners of the bonds secured by the mortgage hereinafter mentioned as made to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis as shall become parties hereto as complainants in the prosecution of this suit.

That your orator, the said Ellis, is owner of thirty of said bonds of one thousand dollars each, and of the matured and unpaid interest warrants thereon payable on the first day of January now last past and on the first day of July now current respectively, and no part of which has been paid, that your orators the said Matthew Bolles & Company are owners of seventeen of said bonds of one thousand dollars each, no part of which has ever been paid.

That the Boston, Hartford and Erie Railroad Company is a corporation having its usual place of business in said Boston, and was created under the laws of the State of New York, Connecticut, Rhode Island and Massachusetts, having for its object the maintenance and operation of a railroad in these States respectively, running from Boston in the State of Massachusetts to Fishkill in the State of New York.

That on or about the day of March, A. D. 1866, the said Railroad Company, as your orators believe, resolved to make a mortgage upon their road and property, and to create, issue and dispose of certain bonds to be secured by said mortgage, and payable in the City of New York on the first day of July, A. D. 1900, for one thousand dollars each, and not to exceed the amount of twenty million dollars in all, the said bonds to be issued for the purpose of providing for and retiring all the then existing mortgage debt and prior liens upon the road and property of the said Boston, Hartford and Erie Railroad Company and to complete and equip said road; that afterwards, the Board of Directors of said Boston, Hartford and Erie

Railroad Company acting under authority of said resolution authorized the creation and issue of twenty thousand bonds of one thousand dollars each in form as follows:

No. $1000.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Know all men by these presents, that the Boston, Hartford and Erie Railroad Company acknowledges itself indebted unto Dudley S. Gregory or bearer in the sum of one thousand dollars lawful money of the United States, which sum it promises to pay at its office or agency in the City of New York on the first day of January, in the year one thousand nine hundred with interest at the rate of seven per centum per annum payable semi-annually on the first days of January and July in each year on the presentation and delivery of the proper annexed interest warrants.

This bond is one of a series of twenty thousand bonds of even date herewith issued for the purpose of paying the existing debt of the Company and of completing and equipping their road. The payment of the principal and interest hereof is secured by a mortgage of the railroad and franchises, furniture and equipment of this Company, bearing date March 19, A. D. 1866, which has been made in trust to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, which is to be the first and only lien on the property and franchises of the Company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees.

Upon the failure to pay any one of the interest warrants hereto attached, upon due presentation, on or after maturity and offer to surrender the same, provided said default continue for the space of six months thereafter, this whole series of bonds, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgagor and to the trustees, shall become due and payable.

This bond is convertible at the option of the holder being then the owner thereof, into the common capital stock of this Company, and upon the surrender of the same, with the proper coupons annexed, the Company agrees to issue a certificate or certificates of capital stock therefor, at par, as at any time authorized by law, when this bond will be cancelled.

In witness whereof this Company has caused its corporate seal to be hereto affixed and this bond to be signed by its President and its Secretary.

Secretary. *President.*

That each of the said interest warrants attached to said bonds was in the words and figures following, to wit:

$35. $35.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY,

will pay . . . . . the bearer, thirty-five dollars, in the City of New York, on the first day of . . . . . 18 . . . , for semi-annual interest on bond No. . . . . .

H. N. OTIS, *Sect'y.*

That thereupon afterwards, the said Boston, Hartford and Erie Railroad Company did issue all of said twenty thousand bonds except one, and the same are now owned by *bona fide* holders for value.

That in order to secure the payment of the said bonds and interest warrants thereon, the said Boston, Hartford and Erie Railroad Company executed and delivered its certain mortgage or deed of trust to Robert H. Berdell of Goshen, in the State of New York, Dudley S. Gregory of Jersey City, in the State of New Jersey, and John C. Bancroft Davis of New Hamburg, New York, as trustees, wherein and whereby it granted, bargained, sold, aliened, released and confirmed unto the said trustees, and the survivors of them, and to their successors and assigns, all and singular the railways of said Boston, Hartford and Erie Railroad Company, commencing at the foot of Summer Street, in Boston, in the State of Massachusetts, and running to Willimantic in the State of Connecticut, through Thompson in said Connecticut, and commencing at Providence, in the State of Rhode Island, and running to said Willimantic, and also commencing on the northerly side of said City of Boston, and running through Woonsocket in said Rhode Island to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York to the western terminus of the location of the railway of said Company on the east bank of the Hudson River at Fishkill, also running from said Willimantic to the city of New Haven in Connecticut, also from a point in said railway in said Thompson to Southbridge in the State of Massachusetts, as said railways were then or should be located, constructed or improved under or by virtue of any powers then granted or that might thereafter be granted or obtained to locate, construct or use a railroad or any of said indicated lines with all the lands that were included or might be included in the location of said Railway or acquired for the use of said Company within the terminal points aforesaid, but not including the lands of the termini at Boston and Fishkill which were outside of the location of said Railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters, also all the like es-

tate, roads, Railroads and structures and matters and things pertaining or belonging thereto, that might be thereafter acquired or constructed or belong to or be controlled by it the said Boston, Hartford and Erie Railroad Company, together with the tolls, income issues and profits to be had from the same, and all rights to receive and recover the same and everything necessary for the complete use of its road, also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood and other fuel belonging or appertaining to said railroad, or that might at any time thereafter belong or appertain to the same as it might be changed by use and new acquisitions, also all the estate real, personal and mixed, of any of the foregoing descriptions or of any other kind that might be thereafter acquired by said Boston, Hartford and Erie Railroad Company, and used or intended to be used in the construction and operation of said railroad.

That a copy of said mortgage is hereto annexed marked Exhibit A.; that a portion of the property covered by the said mortgage is within this State, and a portion thereof, including valuable real estate, is situated in said County of Suffolk.

And your orators further allege that the said Corporation has made default in the payment of the interest warrants upon a large amount of said bonds secured by the mortgage aforesaid falling due the first day of January, 1870, also of the interest warrants falling due on the first day of July, 1870, and that said interest warrants being in default on the first day of January, 1870, and on the first day of July, 1870, are still in default and unpaid.

That the whole of the property of said Corporation, real, personal, and mixed, corporeal and incorporeal in this State and in all other States is grossly inadequate security for the bonds issued by the said Corporation and professedly secured by the mortgage aforesaid, and the earnings of the said Corporation from every source whatever are insufficient to pay the interest secured to be paid under the said mortgage as the same falls due, that the property of the said Corporation has been, as your orators are informed and believe, greatly mismanaged and has greatly depreciated in value since the execution of the said mortgage as aforesaid under which the bonds and coupons are secured, and your orators have reason to believe and do believe that there is imminent danger that the whole security for the said mortgage and for the bonds protected by the same will be speedily wasted and utterly destroyed unless protected by the intervention of the Court.

That as your orators are informed and believe an Act was passed by the Legislature of said Commonwealth of Massachusetts on the twelfth day of April, A. D. 1866, in and by which it was enacted that the pro-

ceedings of the said Boston, Hartford & Erie Railroad Company whereby by Indenture dated March nineteenth, eighteen hundred and sixty-six, they conveyed their Railroad and property in mortgage to said Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, Trustees of the Bondholders in said mortgage mentioned to secure to the holders of said Bonds the payment of the same were ratified and confirmed.

And your orators further allege that after the execution of the said mortgage or Deed of Trust mentioned above the said Robert H. Berdell pretended to resign the trust which he had accepted therein, and John S. Eldridge of said Boston, the then and present President and a Director of the said Boston, Hartford & Erie Railroad, claimed to act in his place, that subsequently the said J. C. Bancroft Davis and Dudley S. Gregory pretended likewise to resign the said Trusteeship under said mortgage and thereupon Mark Haley of Lynn in the County of Essex, and Henry N. Farwell of said Boston, claimed to be Trustees in their place, and that the said Haley and Farwell were at that time and as your orators believe now are Directors of said defendant Company, the Boston, Hartford & Erie Railroad Company, that subsequently the said Mark Haley and the said Farwell pretended to give place to Thomas Talbot of Billerica in said State of Massachusetts and Moses Kimball of said Boston, but whether the said Eldridge has given place or pretended to do so to any other person as such Trustee your orators have no knowledge, that said Berdell, Davis and Gregory claim and pretend that they are no longer Trustees under said mortgage and decline to act as such.

And your orators claim and insist that the said original Trustees, Robert H. Berdell, John C. Bancroft Davis and Dudley S. Gregory, could not finally determine their trust under said mortgage or Deed of Trust without the assent of the Bondholders for whom they were Trustees and without the action of some Court of competent jurisdiction in the premises, and that they are and shall be held to be the present continuing Trustees under said mortgage and amenable to all its responsibilities and liable to all the duties therein mentioned and bound to fulfill all the obligations therein and thereby originally assumed by them.

And your orators further charge and insist that under and by virtue of the terms of the said Bonds above mentioned and of the mortgage given to secure the same there were to be retained in the hands of said Berdell, Davis and Gregory, Trustees as aforesaid, such amount of said bonds as should be equal to the whole amount of the Bonds and mortgage notes outstanding from time to time which then were a lien upon any of the property or franchises by said mortgage to said Berdell, Davis and Gregory conveyed, and that the same were to be delivered to

said Corporation only on the cancellation of a corresponding amount of said outstanding bonds and mortgage notes, as by reference to said bonds and mortgage will more fully and at large appear, that these were so placed in the hands of said Trustees to be used for taking up the unretired debt upwards of Two million Dollars par value of said bonds.

And your orators charge and insist that the said Berdell, Davis and Gregory have not used the said bonds so placed in their hands in Trust to retire the then existing mortgage debt as by the terms of said bonds required, but as your orators believe fraudulently and wrongfully permitted and allowed the said bonds to be used by the officers of said Boston, Hartford & Erie Railroad Company for other purposes so that there is now outstanding upwards of said Two million Dollars of debt on the property and franchises intended to be covered by the said mortgage to Berdell, Davis and Gregory and which last mentioned mortgage was intended as a first and only lien, and all of the said bonds amounting to Twenty millions of Dollars have passed into the hands of *bona fide* holders except one.

And your orators are informed and believe that only a small portion of the proceeds of said bonds have been used in completing or equipping said road and the balance of the proceeds thereof have been used wrongfully by said Boston, Hartford & Erie Railroad Company for other purposes not contemplated by the purchasers of said bonds and in violation of the terms thereof.

And your orators charge and insist on information and belief that said Trustees or pretended Trustees or some of them have connived at or been accessory in some way to the fraudulent disposition of said reserved bonds, and that two or more of them are connected with, as Officers or Directors of a competing and antagonistic Railroad Company the interest of which would be to impair the property and franchise held under the mortgage given to secure the bonds and interest warrants as aforesaid.

And your orators charge and insist that all of said persons are improper and unfit to have any charge or control of the mortgaged property as aforesaid, or to represent your orators and those like situated with them in the premises, and should be restrained from interfering or attempting to interfere therewith.

And your orators further show unto your Honors that there are numerous suits against said Boston, Hartford & Erie Railroad Company, recently brought, now pending in the Courts of this State in some of which attachments of their franchise, real estate and property, have been made, and in others of which attachments of their real estate have been made, to wit, a suit of Edward Haynes in which the *ad-damnum* is Twelve thousand dollars, a suit of Sidney Dillon in which

the *addamnum* is One million two hundred thousand dollars, a suit of Clark & Jones in which the *addamnum* is Ten thousand dollars, all pending in the Supreme Judicial Court in and for the County of Suffolk, a suit of Broad & Ward in which the *addamnum* is Thirty thousand dollars, returnable to the October Term, A. D. eighteen hundred and seventy, of the Supreme Judicial Court in and for said County of Suffolk, four suits in which the Merchants' National Bank of Lowell are plaintiffs, all returnable to the Supreme Judicial Court in and for the County of Middlesex at the next October Term thereof in two of which the *addamnum* is Ten thousand dollars each and in the other two of which the *addamnum* is Twenty thousand dollars each, another suit of said Dillon in which the *addamnum* is One million two hundred thousand dollars, returnable to said Supreme Judicial Court in and for said County of Suffolk at the next October Term thereof, a suit in which Charles E. Powers is plaintiff, returnable to the October Term now next ensuing of the Superior Court in and for said County of Suffolk, the *addamnum* in which is Five thousand dollars.

And your orators further show unto your Honors that one Henry Emerson has obtained judgment and execution in this State, to wit, in the month of March now last past against said Boston, Hartford & Erie Railroad Company and thereupon made a levy upon the property of said corporation, which levy was suspended by reason of prior attachments on the same property.

And your orators further show unto your Honors that your orators are informed and believe that the Legislature of the State of Connecticut at the May session thereof, A. D. eighteen hundred and seventy, passed a Resolution or Resolve, a copy whereof is hereto annexed marked B, and which your orators are informed and believe was approved by the Governor of said State of Connecticut on the eighth day of July, A. D. eighteen hundred and seventy, purporting to authorize said Boston, Hartford & Erie Railroad Company to issue its mortgage bonds to an amount not exceeding Fifteen millions of dollars, each bond to be for One thousand dollars and to be due January first, nineteen hundred, with interest at seven per cent. per annum and with coupons attached payable semi-annually on the first days of July and January in each year, and which Resolution also purports to authorize the said corporation, the Boston, Hartford & Erie Railroad Company to secure the payment of said bonds by a mortgage to three persons as Trustees of all the franchises and property of said corporation, real, personal or mixed, owned by it at the date of the mortgage so authorized or which said corporation might thereafter acquire, however said property might be described, or wherever situate or being.

And your orators further show unto your Honors that said resolution

does not provide, define or indicate for what purpose the proceeds of the bonds thereby authorized shall be used, nor does it provide (as your orators believe) that any portion of said proceeds shall be used in the construction, completion or equipment of the road of said corporation.

And your orators further show unto your Honors that by the terms of the bonds so secured by said mortgage to said Berdell, Gregory and Davis, it is provided, stipulated, and by said corporation agreed with the holders thereof, that said last mentioned mortgage shall cover and embrace other property rights and franchises of said corporation thereafter acquired and that said last mentioned mortgage shall be the first and only lien on the property and franchises of said corporation when the mortgage debt previously existing thereon should be retired. And your orators further show that said previously existing mortgage debt has never been paid, satisfied or retired.

And your orators further show that said corporation, in direct and wanton violation of the terms of said bonds and the agreements of said corporation therein contained, have called a meeting (a copy of the published newspaper notice of which is hereto annexed, marked C,) to be held in said Boston, on the twenty-first day of July, now current, at which meeting of said corporation, the Directors of said corporation threaten to have passed, and at which meeting your orators believe, will be passed by the stockholders of said corporation, unless restrained and interdicted by the injunction of this Honorable Court, a vote authorizing the making execution and issuing under and by color of said resolution of the State of Connecticut, the bonds of said corporation, to the amount of fifteen millions of dollars and a mortgage on all the franchises, rights and property of said corporation, as well within as without the territorial limits of this State, to secure the payment thereof.

And your orators are informed and believe, and therefore represent, that said Directors and the stockholders of said corporation, with the view and for the purpose of unlawfully embarrassing the rights of the bondholders under said mortgage so made to said Berdell, Davis and Gregory, intend at said meeting also to pass a vote giving to the trustees, whoever they my be to be named in said intended mortgage for fifteen millions, the entire, full and absolute possession of the road rolling-stock, depots, buildings, real estate and property of said corporation, all which and the making of said intended mortgage your orators charge, are in direct and palpable violation of the terms and agreements contained in said bonds so secured by said mortgage to said Berdell, Gregory and Davis, and of the rights of the bondholders thereunder.

And your orators further show unto your Honors, that by said last mentioned mortgage, thereafter acquired rights, franchises and property of said corporation which are large and valuable, from time to time, as acquired by said coporation, become subject to and covered by and held under said last mentioned mortgage and the said mortgage in equity if not at law attached thereto, and if said after acquired rights, franchises and property did not at law become subject to said mortgage, said corporation is bound by apt and proper conveyances to mortgage the same to secure the payment of said bonds so secured by said mortgage so made to said Berdell, Gregory and Davis in the manner in that mortgage set forth, and that in equity the holders of said bonds have a right to have a decree against said corporation, to compel it to execute a confirmatory or other proper mortgage accordingly, and that said corporation in violation of their obligation and duty in that respect, propose and intend to mortgage said after acquired as well as its other franchises, rights and property to secure the payment of said proposed bonds to the amount of fifteen millions of dollars. And your orators are advised and believe that by the making of said proposed or intended mortgage, the rights of the holders of the bonds secured by said mortgage to said Berdell, Gregory and Davis in and to the after acquired franchises, rights and property aforesaid as security for the payment of their said bonds will be greatly imperilled. And your orators are informed and believe, that said corporation has no authority under the laws of this State to issue said proposed bonds or make said proposed mortgage.

And your orators further show unto your Honors, that the affairs of said corporation are and have been for a long time past grossly mismanaged by the active Directors thereof, that a large part of the moneys of the said corporation has been directed from the legitimate purposes of said corporation and misappropriated or wasted by them, that each attempt on their part to extricate and relieve said corporation from its difficulties has been unsuccessful and productive of only greater difficulties and pecuniary embarrassments, and that your orators believe that without the equitable intervention of the Honorable Court the mortgaged property will be greatly depreciated in value if not wholly lost.

And your orators further show unto your Honors, that a valuable part of the property of the said corporation, and which is as after acquired rights and property of said Corporation, embraced in and covered by or intended to be embraced in and covered by said mortgage to said Berdell, Gregory and Davis, is a lease dated February 9th, 1869, made by the Norwich & Worcester Railroad Company to said Boston, Hartford & Erie Railroad Company, and ratified and confirmed by the Legislature of this Commonwealth, of all and singular the railway of

said Norwich & Worcester Railroad Company, extending from a point in the city of Worcester, in Massachusetts, to Allyn's point, so called, some miles southerly of the city of Norwich, in Connecticut, with its railway in said city of Norwich, together with its rights, easements, franchises, privileges, lands, tracks, depots, stations and other property therein and thereby demised for the term of one hundred years from and after the first day of February A. D. eighteen hundred and sixty-nine, at the annual rent of two hundred and thirty-five thousand four hundred and thirty dollars, payable semi-annually on the first days of July and January in each year, in equal half-yearly payments of one hundred and seventeen thousand seven hundred and fifty dollars, a copy of which lease is hereto annexed and marked D.

And your orators further show unto your Honors, that it is stipulated and provided in and by said lease that if the rent thereon reserved or any part thereof shall remain unpaid for thirty days from and after any day of payment and written demand to pay the same has been made, then that it should be lawful for the lessors, the said Norwich & Worcester Railroad Company, into and upon the demised premises and every part thereof wholly to reenter and remove all the persons therefrom without process of law, and the same to have again, repossess and enjoy as of their first and former estate, and that said lease at the option of said lessors should be thenceforth forfeited, cease and determine as therein set forth, all which will more fully and at large appear by reference to said copy thereof so annexed as aforesaid to this bill of complaint.

And your orators further show unto your Honors, that said lease is of great importance and value to said Boston, Hartford & Erie Railroad Company as a part of a continuous land and water through route from the City of Boston to the city of New York, and that within the terminal points of the railway so demised there is a large and constantly increasing freight and passenger business, that the semi-annual rent which became due and payable under said lease on the first day of July current has not been paid and is in arrear and payment thereof has been demanded by said lessors of said lessees, and the thirty days from the time of said demand will soon expire, and your orators are informed and believe that said lessees have not the means and cannot raise the means to pay the said matured and overdue rent, and that if a Receiver is oppointed by this Honorable Court pursuant to the prayer of this bill, the holders of the bonds secured by said mortgage so made to said Berdell, Gregory and Davis, will place in his said Receiver's hands sufficient funds to pay said overdue rent and thus preserve said lease.

And your orators further show unto your Honors, that the public

have justly lost confidence in the officers of said Boston, Hartford & Erie Railroad Company and in their management and administration of the property, business and affairs of said road, and that the bonds now held secured by said mortgage to said Berdell, Gregory and Davis have declined and depreciated so much in the market that the same cannot now be sold for more than twenty seven per cent. on the face thereof and the price thereof is, as your orators believe, steadily declining.

And your orators further show unto your Honors, that your orators can have adequate relief in the premises only in a Court of Equity, where matters of this nature are properly cognizable and relievable. To the end therefore that such after acquired franchises, rights and property may be decided to be embraced in and pass and covered by said mortgage so made to said Berdell, Davis and Gregory, or if not so decreed that said Boston, Hartford & Erie Railroad Company may be decreed by apt conveyances to mortgage the same to secure the payment of said bonds, and that an account may be taken and stated of the amount due to the several holders of the said bonds and interest warrants as well for principal as for interest that has accrued and remains unpaid, and also an account of the property covered or embraced or intended to be covered or embraced by said mortgage, and that said mortgage may be foreclosed, and that the railroad rolling-stock, franchises, rights and property covered or embraced in or by, or intended to be covered or embraced in or by said mortgage may be sold under the decree of this Honorable Court, subject to any prior incumbrance existing thereon or otherwise, as this Court shall direct, and that from the proceeds of such sale the holders of the bonds so secured by said mortgage to said Berdell, Gregory and Davis may be paid the amount of said bonds or the interest due thereon, and that they may have as to the principal thereof such protection in or upon or in respect to said proceeds as shall be proper, that in the meantime and until the final adjudication of this cause some proper person may be appointed by this Honorable Court, Receiver of all the railroad rolling-stock, franchises, rights and property covered by or embraced in, or intended to be covered by or embraced in said mortgage so made to said Berdell, Gregory and Davis, and of all the rents, income, profits and issues therefor therefrom, and apply the same under the order of this Honorable Court, with full power to run and operate said road, and with all the other usual and incidental powers ordinarily vested in or granted to Receivers in like cases, and that said Boston, Hartford & Erie Railroad Company, its President, Directors, Officers and agents, and said Berdell, Davis and Gregory, Eldridge, Haley, Farwell, Talbot and Kimball, and each and every of them,

and all persons claiming or pretending to act as trustees under said mortgage may be restrained and enjoined by the injunction of this Honorable Court from interfering with any or any part of the railroad rolling-stock, franchises, rights or property covered by or embraced in or intended to be covered by or embraced in said mortgage so made to said Berdell, Gregory and Davis, and that said Boston, Hartford & Erie Railroad Company, its President, Directors, Officers and agents, and each and every of them may also be restrained by the injunction of this Honorable Court, from making or issuing any bonds or any mortgage under said resolution of the Legislature of the State of Connecticut, or under any other authority real or pretended, or otherwise making or creating any incumbrance on any of the railroad rolling-stock, franchises, rights or property covered by or embraced in or intended to be covered by or embraced in said mortgage so made to said Berdell, Gregory and Davis, and that said Boston, Hartford & Erie Railroad Company, and said Berdell, Gregory, Davis, Eldridge, Haley, Farwell, Talbot and Kimball (and all other persons, if any, claiming or pretending to act as trustees under said mortgage, and who (if any) your orators pray may be made parties defendant hereto when ascertained,) may answer all and singular the premises, but not under oath, the benefit of which is hereby waived, and that your orators may have such further and other relief in the premises as the nature and circumstances of this case shall require and to your Honors shall seem meet.

May it please your Honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna to be directed to the said Boston, Hartford & Erie Railroad Company and said Berdell, Gregory and Davis, Eldridge, Haley, Farwell, Talbot and Kimball, commanding them at a certain time and under a certain pain therein to be limited personally to be and appear before your Honors in this Honorable Court, then and there full true direct and perfect answer make to all and singular the premises, but not under oath, and to stand, to abide and perform such order, direction and decree therein as to your Honors shall seem meet.

(Signed,) GEORGE ELLIS,
MATTHEW BOLLES,
MICHAEL S. BOLLES.

(Signed,) BROOKS & BALL,
Of Counsel with Complainants.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *ss.*:

BOSTON, July 20th, A. D. 1870.

Then the said George Ellis, Matthew Bolles and Michael S. Bolles, complainants in the foregoing bill of complaint, personally appeared

and made solemn oath that the statements contained in said bill of complaint so far as made upon their personal knowledge are true, and so far as made upon information or belief are verily believed by them to be true.

Before me,

(Signed,) JOSHUA D. BALL,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *ss.:*

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the foregoing is a true copy of the Bill of Complaint in the suit in Equity of George Ellis *et al.*, *v.* Boston, Hartford & Erie Railroad Co. *et al.*, pending in said Court.

In witness whereof I have hereto set my hand and
[L. S.] affixed the seal of said Court this twenty-sixth day of May, A. D. 1881.

JOHN NOBLE,
Clerk.

A.

COPY.

This Indenture of Mortgage, made this nineteenth day of March, in the year one thousand eight hundred and sixty-six, by and between the Boston, Hartford and Erie Railroad Company, a corporation existing under the laws of the States of New York, Connecticut, Rhode Island and Massachusetts, party of the first part, and Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, Trustees, parties of the second part, witnesseth:

Whereas the shareholders of the Boston, Hartford and Erie Railroad Company, at a meeting duly and lawfully called and held at the City of New York, on the fourteenth day of March, A. D. 1866, voted to authorize the Directors to make application to the several Legislatures of the States in which the chartered rights of this road exist, for authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue and dispose of, at the best rates that can be obtained, their convertible mortgage bonds, payable in the City of New York, on the 1st day of July, A. D. 1900, for one thousand dollars each, not to exceed the amount of Twenty Millions of Dollars in all, (such portion of the principal and interest thereof, however, as the Directors of the company may authorize, to be made payable in London, in the Kingdom of Great Britain, in sterling currency, at the rate

of four shillings sterling to the dollar,) interest payable semi-annually on the first days of January and July in each year at the rate of seven per cent. per annum, interest and principal to be payable at such places in the City of New York or in London as the Directors may authorize; and the particular form of bonds, interest warrants thereon, and mortgage to be left entirely at the discretion of the Board of Directors, the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road, and of laying down a third rail so as to form an additional track corresponding with the gauge of the Erie Railway of New York.

And whereas the said Board of Directors, at a meeting duly convened and held in the City of New York, on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first mortgage bonds of said company in the following form, when of Federal currency (to wit):

No.——— $1,000.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Know all men by these presents, that the Boston, Hartford and Erie Railroad Company acknowledges itself indebted unto Dudley S. Gregory, or bearer, in the sum of one thousand dollars, lawful money of the United States, which sum it promises to pay at its office or agency in the City of New York, on the first day of January, in the year one thousand nine hundred, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of January and July in each year, on the presentation and delivery of the proper annexed interest warrants.

This bond is one of a series of twenty thousand bonds of even date herewith, issued for the purpose of paying the existing debt of the company, and of completing and equipping their road. The payment of the principal and interest hereof is secured by a mortgage of the railroad and franchises, furniture and equipment of this company, bearing date March 19, A. D. 1866, which has been made in trust to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said Trustees.

Upon the failure to pay any one of the interest warrants hereto attached, upon due presentation, on or after maturity and offer to sur-

render the same, provided said default continue for the space of six months thereafter, this whole series of bonds, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgagor, and to the Trustees, shall become due and payable.

This bond is convertible at the option of the holder, being then the owner thereof, into the Common Capital Stock of this company, and upon the surrender of the same with the proper coupons annexed, the company agrees to issue a certificate or certificates of Capital Stock therefor, at par, as at any time authorized by law, when this bond will be cancelled.

In witness whereof this company has caused its corporate seal to be hereto affixed, and this bond to be signed by its President and its Secretary, the day of eighteen hundred and sixty-six.

[SEAL]

. . . . . *President.* . . . . . *Secretary.*

We certify that this bond is one of the twenty thousand bonds of one thousand dollars each (or two hundred pounds each, when in sterling currency,) secured by the mortgage referred to above, and that said mortgage has been delivered to us and recorded as authorized by law.

} *Trustees.*

And such of the said bonds as shall be made payable in Sterling currency shall be for the principal sum of two hundred pounds Sterling, in lieu of one thousand dollars, and the principal and interest thereof shall be made payable at such place in London as the Directors of the company shall authorize, in lieu of the office or agency of the company in the City of New York.

And, whereas the said Directors, at their said meeting, further voted to empower bonds of said form, either in Federal currency or Sterling currency, or either, hereafter to be issued, and to be secured under the mortgage, and the said corporation thereby to become indebted to the divers persons or bodies politic or corporate who may become the holders thereof, but not in a greater principal sum than twenty millions of dollars in all, or a proportionate part thereof in Sterling currency, at the rate of four shillings sterling to the dollar: And further, at the same time voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents.

Now therefore, this Indenture witnesseth, that the parties of the first part for the better securing and more sure payment of the sums

of money mentioned in the said mortgage bonds, and each of them according to the tenor thereof, and in consideration of one dollar to them paid by the parties of the second part, at or before the ensealing hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, aliened, released and confirmed, and by these presents do grant, bargain, sell, convey, alien, release and confirm, unto the said parties of the second part, and the survivor of them and to his and their successors and assigns, all and singular the railways of said Boston, Hartford and Erie Railroad Company, commencing at the foot of Summer Street in Boston, in the State of Massachusetts, and running to Willimantic in the State of Connecticut, through Thompson in said Connecticut, and commencing in Providence in the State of Rhode Island, and running to said Willimantic, and also commencing on the northerly side of said City of Boston, and running through Woonsocket in said Rhode Island to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York to the western terminus of the location of the railway of said Company on the east bank of the Hudson River at Fishkill; also running from said Willimantic to the City of New Haven in Connecticut, also from a point in said railway in said Thompson to Southbridge in the State of Massachusetts, as said railways are now or shall be located, constructed or improved under or by virtue of any powers now granted or that may hereafter be granted or obtained to locate, construct or use a railroad on any of said indicated lines, with all the lands that are included or may be included in the location of said railway or acquired for the uses of said company within the terminal points aforesaid, but not including the lands at the termini at Boston and at Fishkill, which are outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters; also all the like estate, roads, railroads and structures and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed or belong to or be controlled by the party of the first part.

Together with all the tolls, income, issues and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of the road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also all the estate, real, personal and mixed, of any of the foregoing descriptions,

or of any other kind which may be hereafter acquired by the party of the first part, and used or intended to be used in the construction and operation of the said railroad.

To have and to hold the same, together with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereunto belonging unto the said parties of the second part and the survivor of them and his and their successors and assigns forever on the trust and for the uses and purposes herein declared and none other.

Provided always, and these presents are upon the express condition, that if the said parties of the first part, shall well and truly pay, or cause to be paid, to the holders of the said mortgage bonds or obligations, intended to be secured hereby, and every of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with interest thereon at the times and in the manner therein provided, according to the true intent and meaning of these presents, that then and from thenceforth this Indenture and the estate hereby granted, shall cease, determine and be utterly void.

And this Indenture further witnesseth, that these presents, and the said mortgage bonds or obligations, hereby intended to be secured, are made, executed and delivered, upon the terms, conditions and agreements following, that is to say:

First.—That the actual possession, use, management and control, of all the granted premises shall remain with the parties of the first part, so long as the said mortgage bonds shall remain without default or forfeiture, who may, from time to time, with the consent of the Trustees, in writing, sell or exchange any of the mortgaged estate and purchase with the proceeds other property, to be included under this Indenture.

Second.—That in the case of the death, resignation or removal of one of said Trustees, the premises hereby conveyed, and the trusts hereby created shall vest in the survivors or survivor, who shall thereupon appoint in writing, by deed, a person or persons in the place and stead of the Trustee or Trustees so deceased, resigned or removed, and such appointment and the acceptance thereof, shall vest the said premises and trusts in the person so appointed jointly with the Trustee so appointing, as fully as if such appointment had been originally made in this deed; and all subsequent vacancies happening in said trust shall be filled in like manner, and with like effect by the Trustee in each case remaining. And in case of the decease, removal or resignation of all of said Trustees, the vacancies may be filled by any Judge of the Supreme Court of the State of Connecticut, on application of any party interested, on such

notice to the other parties interested as the Judge acting shall order; and the Trustees so appointed and accepting shall become vested with all the franchises and estate hereby conveyed, on recording or lodging a certified copy of the order for their appointment in all places where this mortgage is required by law to be recorded or lodged.

And this Indenture further witnesseth, that the said parties of the first part, for themselves and their successors, do covenant and agree to and with the said parties of the second part, the survivor of them and his and their successors and assigns,

1st. That they will at their own proper charge do all things necessary to be done to keep intact the lien hereby created.

2nd. That they will at any time or times hereafter, upon the request of said parties of the second part, their successors or assigns, make, do and execute, and cause to be made, done and executed, all and every such further and reasonable acts, conveyances, assignments and assurances in the law, for the better and more effectual vesting and confirming the premises hereby granted or intended so to be, in and to the said parties of the second part, their successors and assigns forever, as by the said parties of the second part, their successors or assigns, or their counsel learned in the law shall be reasonably devised, advised or required.

3rd. That of the whole issue hereby authorized to be made of said bonds, there shall be retained in the hands of said parties of the second part such amount of said bonds as shall be equal to the whole amount of the bonds and mortgage notes outstanding from time to time which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part only on the cancellation of a corresponding amount of said outstanding bonds or mortgage notes.

4th. That the party of the first part will, at the close of the year 1869, and at the close of each year thereafter during the continuance of this trust, pay to the parties of the second part, their successors and assigns, a sum equal to ten per cent. upon the net earnings for the current year, remaining after the payment of the current interest for that year on the then outstanding bonds issued under this mortgage; which sums the said Trustees shall invest as received in said mortgage bonds, if the same can be purchased at not exceeding one hundred and twenty-five per cent.: and if they cannot invest the same in said mortgage bonds, at that limit, thy shall invest them in gold-bearing securities of the United States: and they shall invest all sums received from interest and dividends on the trust fund in like manner, and shall hold the trust fund as a security for the payment of the said mortgage bonds at maturity, and shall annually, on the first day of January

in each year, report the condition of the said trust fund to the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York.

5th. That the parties of the first part will pay unto the holders of the said mortgage bonds respectively the said principal sums of money respectively mentioned as above, and as expressed in said bonds, and will pay the interest thereon as the same shall become due and payable.

6th. That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage, shall be made with the approval of at least one of the said Trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales.

7th. That in case default be made by said company in payment of any moneys, either principal or interest, secured hereby (the default continuing for six months,) the said company shall, on demand of the Trustees or Trustee for the time being, or his or their agent authorized thereto in writing, deliver to said Trustees or Trustee, or his or their agent, the actual possession of all the herein granted premises; and thereupon the said parties of the second part shall and may by themselves, their officers, agents, and employees, take, receive and operate the said railroad franchises and other property and estate hereby conveyed, and collect, receive and have the rents, income and profits thereof as fully as the party of the first part could do if no default had been made; and while so in possession, the said party of the second part shall apply such part of said rents, income and profits, as shall in their judgment be necessary, to the payment of the running and operating expenses of the road, including the necessary repairs of road, road-bed, buildings, machinery and equipment, and all expense of agents, clerks, officers, employees and laborers, and all claims for damages allowed, and all payments for insurance and taxes, and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvement of said roads, buildings, machinery and equipment as the business shall in their judgment require, and to the payment of any and all claims necessary to secure and assure to them the estate and franchises hereby conveyed, and to their own compensation, and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a court of equity in the case of a Receiver, as settled and established in the case of the Receivership of the New York and Erie Railroad. And parties of the second part are further authorized and empowered, after having taken possession as aforesaid, to contract with any other corporation, to lease or to operate the said

railroad and franchises for any period not exceeding the term that the Trustees are herein authorized to retain possession thereof.

8th. Said parties of the second part having taken possession as aforesaid, shall be further authorized, and may be required, whenever there shall be in their possesion a sufficient sum for such purpose, (not required for any of the purposes aforesaid,) to pay in full any one class (beginning with the earliest,) of matured and overdue interest warrants on said bonds to the person or persons holding and presenting them for payment: and the said parties of the second part shall, while in possession of said roads and operating the same, or causing the same to be operated on a lease thereof, keep full and accurate accounts of all sums received or paid out by them, which shall be at all reasonable times open to the inspection of the party of the first part, and they shall at least once a year publish abstracts thereof for the use of the bondholders: and whenever the said parties of the second part are in doubt as to any of their powers or duties in the premises, they may apply to the Supreme Court of the State of Connecticut, or any Judge thereof in Chambers for directions, and the directions or order of said Court or of such Judge thereof, on their application, when complied with, shall be their full protection for so doing.

9th. On taking possession as aforesaid the said Trustees shall file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice acknowledged before a Notary Public, that they have taken possession of said mortgaged property, franchises and estate for default in the payment of principal or interest or both as the same may be, and of their purpose to foreclose the said mortgage for said default. And if the said default shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the parties of the second part without further assurance and without further process of law, and all right or equity of redemption of the party of the first part therein shall be forever barred and foreclosed; but if the whole of the principal and interest in arrear, with interest thereon when the same may by law be demanded, and the lawful claims, disbursements and liabilities of the said Trustees made or incurred as aforesaid on account of their trust, shall be paid and satisfied within the said period of eighteen months after the said notices shall have been filed, either by the said party of the first part (which right they are to have,) or out of the net earnings of the property in the Trustees' possession, then the said parties of the second part shall surrender unto the said parties of the first part the said mortgaged property, franchises and estate and all additions made by them thereto, and the said parties of the first part

shall thereupon and thereby become revested with the same, as of their former estate, without further assurance.

10th. In case of an absolute foreclosure under the provisions of this instrument, it shall be the duty of the Trustees to call a meeting of the holders of the mortgage bonds secured by this instrument, by an advertisement of the time and place and object thereof at lea-t three times a week, for three successive weeks, in newspapers published, one in the City of Boston, one in the City of Providence, one in the City of Hartford, one in the City of New York, and one in London, in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part or their successors as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a Board of Directors of like number with the then Board, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions of the Boston, Hartford and Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured hereby at the rate of ten shares for every bond of one thousand dollars or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid. And the said parties of the second part shall by deed convey unto the said new corporation all the said mortgaged property, premises, estate and franchises, and all additions thereto, and all moneys remaining in their hands when they shall be fully paid and indemnified for their services and liabilities as herein before provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation they shall file in the offices of the several Secretaries of State above named copies of their proceedings in the organization under their corporate seals, attested by their President and Secretary, which shall be *prima facie* evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation as herein provided.

11th. The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said States as they exist now or may hereafter exist, and any court of com-

petent jurisdiction may enfore any of the provisions of this instrument.

12th. Whenever, and as soon as any bonds authorized to be issued hereby shall be created, issued, negotiated and sold, the holders of the six per cent. bonds issued by the Boston and New York Central Railroad Company, secured by their mortgage, dated March 7th, 1854, and the holders of the six per cent. bonds and mortgage notes, issued by the New York and Boston Railroad Company, and secured by ther mortgage, dated December 30th, 1862, and each of them, shall have the right, within two years from the time when any of said bonds under this Indenture shall be created, issued, negotiated, and sold, to exchange their said bonds or mortgage notes for the bonds to be issued under this Indenture, upon the following terms, to wit: upon the surrender to the Boston, Hartford and Erie Railroad Company of the said bonds of the Boston and New York Central Railroad Company, or of the said bonds or mortgage notes of the New York and Boston Railroad Company, in sums of not less than one thousand dollars, with all the unpaid coupons, the said Boston, Hartford and Erie Railroad Company shall give in exchange a seven per cent. Boston, Hartford and Erie Railroad bond for one thousand dollars, to be issued under this Indenture, drawing interest from January 1st, 1867, and for all sums smaller than one thousand dollars, certificates shall be issued, exchangeable into said Boston, Hartford and Erie Railroad Company bonds, whenever they are presented to the said Boston, Hartford and Erie Railroad Company in sums of one thousand dollars. And the holders of the seven per cent. bonds issued by the Boston, Hartford and Erie Railroad Company, and secured by their mortgage dated February 2d, 1864, and each of them, shall have the right within the same time to exchange their said bonds for the bonds to be issued under this Indenture upon the following terms, to wit; upon the surrender to said Boston, Hartford and Erie Railroad Company of said bonds of the Boston, Hartford and Erie Railroad Company, with all the unpaid coupons, the said Boston, Hartford and Erie Railroad Company shall give in exchange seven per cent. Boston, Hartford and Erie Railroad bonds to be issued under this Indenture for the amount so surrendered, with certificates as aforesaid for all sums smaller than one thousand dollars.

And this Indenture further witnesseth, that the parties of the second part do hereby accept the aforesaid trusts and agree to execute them upon the following terms and conditions which are mutually agreed to by the parties, namely: that neither Trustee shall be answerable for the acts, omissions or defaults of the other, to which he does not give his assent: that each shall be answerable for gross negligence and wilful defaults only: that the Trustees or either of them may employ or ad-

vise with legal counsel, and that the expenses thereof, and all the personal expenses of the Trustees, in discharge of the trust, and all other reasonable and proper charges and expenses of the Trustees, including their compensation, shall be paid by the parties of the first part as they are incurred, or otherwise out of the trust estate on which they are charged: that neither shall be bound to pay or discharge any prior incumbrances on said mortgaged property or estate, nor any part thereof, without being first furnished with the means necessary to make such payments by the person so requiring: that they shall not be required to act in the execution of these trusts except at their own option, unless requested in writing by the holders of at least bonds to the amount of fifty thousand dollars nominal par value, and also furnished with such funds as their counsel shall advise them are necessary and proper to enable them to commence proceedings, and also with a responsible and sufficient agreement to pay the current accruing expenses, obligations and liabilities which they may incur by reason of so acting, and also a reasonable compensation to them for so doing: that when called upon to act, they shall be invested with full power to submit all questions of law or fact arising in the execution thereof to arbitrators, and also to compromise and settle any or all such questions; that they may employ agents or attorneys in fact to act for them whenever required to act themselves; and that all the covenants and agreements herein contained or implied may be executed specifically by any court of competent jurisdiction.

In witness whereof, the parties of the first part have caused these presents to be sealed with their corporate seal and attested by their President and Secretary, and the said Trustees have signed and sealed these presents the day and year first above written.

The Boston, Hartford and Erie Railroad Company,

[L. S.] By GEO. M. BARTHOLOMEW, *President*,
HORATIO N. OTIS, *Secretary*.

[U. S. Rev. Stamps.]

ROBERT H. BERDELL, [Seal,]
D. S. GREGORY, [Seal,]
J. C. BANCROFT DAVIS, [Seal,]
Trustees.

Signed, sealed and delivered in the presence of
WM. H. BALDWIN,
M. SMITH.

UNITED STATES OF AMERICA.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

[Com'rs Seal.] By this public instrument be it remembered that on this 25th day of April, A. D. one thousand eight hundred and sixty-six, before me the subscriber Joseph B. Nones, a commissioner in and for the State of New York, appointed by the Governor of the State of Massachusetts, to take proof and acknowledgment of deeds, martgages, letters of attorney, or any other instrument to be used or recorded in the said State of Massachusetss, and to administer oaths and affirmations, take depositions, &c., &c., personally appeared George M. Bartholomew, President, and Horation N. Otis, Secretary, of the Boston, Hartford and Erie Railroad Company, and Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, Trustees of said Railroad Company, the persons described in and who executed the annexed instrument, and acknowledged to me that they severally executed the same voluntarily and freely, for the uses and purposes herein stated, as the free act and deed of said Company, and the said George M. Bartholomew, and the said Horatio N. Otis, being by me sworn in due form of law on their respective oaths, say that they are President and Secretary of said Railroad Company as above stated; that the seal attached to the annexed instrument is the proper corporate seal of said Company, and that the same and the signatures of said officers and trustees were placed there by authority of the Directors of said Company. And I further certify that I know the persons who made the said acknowledgment to be the identical persons described in and who executed the said annexed instrument.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, the year, month and day first before written.

J. B. NONES,
[L. S.] Commissioner for the State of Massachusetts for the State of New York aforesaid.

The execution of the above mortgage is also acknowledged in the above form before said Nones as Commissioner of the States of Connecticut and Rhode Island, and as Notary Public of the State of New York.

The mortgage was "ratified and confirmed" by special acts of the Legislatures of the States of New York, Massachusetts, Rhode Island and Connecticut, at their several sessions A. D. 1866.

B.

COPY.

STATE OF CONNECTICUT.

OFFICE OF SECRETARY OF STATE.

General Assembly, May Session, A. D. 1870.

Resolved by this Assembly:

The Boston, Hartford and Erie Railroad Company is authorized to issue its mortgage bonds to an amount not to exceed in all fifteen millions of dollars; the principal sum in each bond to be one thousand dollars, and to be due January first, nineteen hundred, with interest at seven per cent. per annum, and with coupons attached, payable semi-annually on the first days of July and January in each year, and may secure the payment of the same by a mortgage to three persons, trustees, of all the franchises and property of said Railroad Company, real, personal and mixed, owned by it at the date of the mortgage, or which it may hereafter acquire, however said property may be described, or wherever situate or being.

Said trustees, together with their successors shall be approved by the chief Judge or the acting chief Judge of the Supreme Court of Connecticut, and one of said trustees shall at all times be a resident of this State. And the avails of the first bonds issued under this act and used in the construction of said road, shall be used to complete the same easterly from Willimantic to the State line of Massachusetts, and it shall be the duty of such trustees to see and know that whenever any bonds are issued as herein authorized and are used in the construction of the road easterly from Willimantic, there shall be at least three times the amount set apart to be used in the construction of the road of the Company westerly from Waterbury.

SEC. 2. Said mortgage shall be recorded in the office of the Secretary of this State, which shall be a sufficient recording of the same.

Approved July 8th, 1870.

STATE OF CONNECTICUT, *ss.*
Office of Secretary of State.

I hereby certify that the foregoing is a true copy of record in this office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said State, at Hartford, this 8th day of July, A. D. 1870.

[L. S.]

M. P. M. WALLER,
Secretary of State.

C.

NOTICE.—A meeting of the Stockholders of the Boston, Hartford and Erie Railroad Company will be held at office of the Company, No. 12 Pemberton Square, Boston, on the 21st inst., at 11 o'clock, A. M., to see if said Company will accept the Act of the Legislature of Connecticut amending or changing the Charter of the Company, and empower the Directors to do the acts and things authorized in said Acts.

THOMAS E. GRAVES, *Secretary.*

Boston, July 15, 1870.

D.

This Indenture made this ninth day of February, one thousand eight hundred and sixty-nine, between the Norwich and Worcester Railroad Company, a company existing by virtue of the laws of the States of Connecticut and Massachusetts, of the first part, and the Boston, Hartford and Erie Railroad Company, a corporation existing by virtue of the laws of Connecticut, Rhode Island, New York and Massachusetts, of the second part, witnesseth:

Whereas, it is believed to be for the advantage of the public, and of both parties hereto, that the railway and steamboat property of the party of the first part should be managed and operated for the term of this lease by the party of the second part:

Now, therefore, these presents witness, that the parties hereto, in consideration of the premises, and of the several provisions hereinafter contained, for the benefit of each respectively, do hereby mutually covenant, promise, contract and agree, to and with each other as follows, to wit:

First.—Said party of the first part hath demised, leased and rented, and doth by these presents demise, lease and rent, for the term of one hundred years, from and after the first day of February, A. D. eighteen hundred and sixty-nine (1869), unto the said party of the second part, and its successors, all and singular, the railway of the said party of the first part, extending from a point in the City of Worcester in Massachusetts, to Allyn's Point, so called, some miles southerly of the City of Norwich in Connecticut, with its railway in said City of Norwich, together with all the lands on which said railway is or shall be located within said terminal points, and which are connected with the uses of said railway, and all the rights, easements, franchises and privileges in connection therewith, or which are appurtenant thereto, and all

the turnouts, branch tracks, depot-grounds, stations, depots, superstructures, erections and fixtures used therewith and belonging thereto, and the lands and premises on which the same are situate and standing, now used and belonging, and to be used or belonging, or in any wise appertaining to said railroad, together with all and singular the real estate, tenements, hereditaments, and appurtenances of the party of the first part; together with and also the right to ask, demand, and receive, for their own use and benefit, of all the tolls, profits, income and rent, and charges which may or can be legally demanded or received for the transportation of persons or property upon or over the said railroad, or any part thereof, or resulting in any wise from the operation and working of said railroad, or the use and occupation of said demised property, or any part thereof, together with the use of all the personal property of said party of the first part, used, or to be used upon or in connection with said leased railroad, however the same may, can or should be described, and wherever situate and being; with the dividends and profits of the steamboat stock owned by said party of the first part, and excepting the books of record, and accounts and papers pertaining to the business of said party of the first part, and the shares in the capital stock of said company. Said party of the second part, or any person by its Board of Directors from time to time designated, shall have the right to vote on said shares of steamboat stock as the agent and attorney of said party of the first part; and said party of the first part will, on request, execute and deliver to such attorney so designated proper proxy to enable such attorney to vote in any meeting of said steamboat company in manner as aforesaid; and said party of the second part shall so cause said votes on said shares to be cast as will best insure the prosperity of said steamboat interest, and so that the equipment of the line shall be kept up to meet any present or future demand of the business done, or that may be done in connection with the leased railrood and property: yielding and paying rent therefor to the treasurer of said party of the first part, annually, ten (10) per cent. on the capital stock of said company, party of the first part, the same being free from all taxes, assessments, and charges of every name and nature,—said annual rent being the sum of two hundred thirty-five thousand four hundred and thirty ($235,430) dollars, to be paid in lawful money of the United States, semi-annually, on the first days of July and January in each and every year, in equal half-yearly payments of one hundred seventeen thousand seven hundred and fifteen ($117,715) dollars, from and after January, 1869, —said payment to be made at the office of the treasurer of said party of the first part, and also all taxes, rates, charges, and assessments, ordinary and extraordinary, which may be imposed or assessed in any

way on said property herein and hereby leased, and on said rental or dividend;

Provided always, nevertheless, that, if the rent above reserved, or any part thereof, shall be behind or remain unpaid for thirty (30) days from and after any day of payment, whenever the same ought to be paid as aforesaid, and written demand to pay the same has been made; or if default shall be made for the space of thirty (30) days in any of the covenants herein contained to be paid, kept and performed for the benefit of said party of the first part, and written notice to pay, or keep, or perform the same has been made, then and from thenceforth it shall be and may be lawful for the said party of the first part, its successors and assigns, into and upon the said demised premises and every part thereof wholly to re-enter, and remove all persons therefrom without process of law, and the same to have again, repossess, and enjoy as in their first and former estate, anything herein contained to the contrary notwitstanding; and this Indenture, and all the provisions therein contained, may, at the option of said party of the first part, thereupon be declared to be and the same shall thenceforth be forfeited, and shall cease and determine, except so far as to enable the party of the first part to collect the rent due up to the time, and the proportion of rent accruing to that time, from the time the party of the first part shall thus re-enter upon, repossess and enjoy the said demised property upon such forfeiture; and also except so far as any right for damages may have accrued or existed by reason of the non-performance of any of the covenants of this Indenture:

And the said party of the second part, for itself, its successors and assigns, does covenant and agree to and with the said party of the first part, its successors and assigns, that it, the said party of the second part, its successors and assigns, shall and will yearly and every year year during the said term hereby granted, well and truly pay or cause to be paid unto the said party of the first part, its successors or assigns, in the manner as aforesaid, the said rent herein reserved, on the days and in the manner herein limited and prescribed for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents.

Second.—The said party of the second part and its successors will pay, bear and discharge all taxes, rates charges, assessments, and levies, ordinary and extraordinary, of every kind, which may be levied, charged, assessed, or imposed on all or any part of the demised property and the capital stock of said company, whether the same be imposed by the Federal or State Governments, or by any municipal or other authority; and also all taxes or assessments, by whomsoever

lawfully imposed, upon any business or traffic transacted by it upon or over the said leased railway, and all income taxes on the business or profits; and in all such cases protect and save said party of the first part harmless of, from, and against any and all cost and expense on account of the same, so that the said party of the first part shall receive a clear annual revenue of two hundred thirty-five thousand four hundred and thirty ($235,430) dollars from said demised property, without any diminution or reservation from or by reason of any of the causes aforesaid; and also that in case, by law, the taxes now imposed on the real property shall be lifted or laid on the capital stock or franchise of the corporation, party of the first part, so far as the said real estate is relieved, and the capital stock thereupon taxed, the amount of such tax or imposition shall be paid by said party of the second part to said party of the first part.

Said party of the second part agrees that it will at all times keep the buildings and other personal estate leased, and which is now insured, as fully insured as the same now is, for the benefit of said party of the first part; and that any building or other property insured and destoyed by fire shall be at once rebuilt, replaced or renewed; and a like or greater amount shall be kept insured on any new building or improvements, or renewals, or new purchases, or new constructions, or property put in place and stead of any had under this lease, and destroyed as aforesaid. And it is mutually agreed that any and all sums had upon any policy of insurance upon any property insured as aforesaid, or on any property under any policy now held by said party of the first part on said property, shall be received by said party of the second part, and by it be used in renewals or substitutions of like property to that insured under such policy or policies of insurance.

Said party of the second part agrees that it will at all times keep and maintain said railway, in its roadbed, bridges, superstructure, buildings, grounds, fences, and in each and all things pertaining to the same, and in everything pertaining to the rights and uses of the public connected therewith, in as good order, repair, and condition as when received, and replace and keep up all such of the fixtures, rolling stock and furniture supplies, and other property, as shall be shown by an inventory to be taken and appended to this indenture, as shall or may wear out, or be destroyed by use, fire, flood, accident, design or removal; so that at all times there shall be upon and connected with said leased railway all things evidenced by such inventory in as good condition, and to as full extent and amount as shown by said inventory; and such new property or renewals as aforesaid, shall be, and stand the estate of said party of the first part in the place and stead of any of like property worn out, destroyed or removed. And said party of the

second part shall at all times during the continuance of this indenture maintain and keep said railway and other estate in manner as aforesaid, and shall, at the expiration or other sooner determination of the term hereby granted, surrender said railroad and other property so to be had, and renewals or substitutions of and for the same, in as good order, state and condition as when received; and shall also deliver of said personal estate an amount of like description as that found in said schedule, and of like value as that received, to be determined as hereinafter provided; and said party of the second part does stipulate and agree that the repair-shops herein leased, situate in Norwich, shall be maintained there, and shall not be removed. An inventory and appraisal of the personal property had, and to be kept up and returned in kind as aforesaid shall at once be made by P. St. M. Andrews and Wm. M. Parker, and if they do not agree upon the same, any person by them agreed upon; and if they do not agree, any person agreed upon by the directors of the party of the first and second part shall act with them, and shall make a Board of Inventory and Appraisal; and if said Andrews and Parker shall agree, or, failing to agree, a written inventory and appraisal of said personal property, signed by either two of said Board shall be final and binding on the parties hereto, as to the personal property had under this Indenture, and the value thereof, and such paper shall be appended hereto, the same being made in duplicate and appended to the contract held by the parties hereto severally, and shall be the basis and proof of the kinds, value and amounts to be at all times kept and maintained by the party of the second part upon or in connection with said leased railway and property. Said appraisal shall be made upon a basis of lawful money; and at all times when any appraisals are to be had under these provisions during the continuance of and at the termination of this Indenture, the lawful money of the United States shall be used. At the termination of this Indenture, if it shall be found on appraisal that the personal estate returned by the second to the first party shall be less in value than the amount received under this Indenture and said appraisal, said party of the second part shall pay the difference to said party of the first part in such manner as to make the payment equal to its value in lawful money; and if the property in hand and to be returned shall be of greater value than the amount received as aforesaid, said party of the first part may elect to choose and retain so much and such as it shall elect, to the amount due it, or may take the whole at the appraisal, and pay for the same in such manner as to make the balance to be paid equal to lawful money as aforesaid.

It is mutually agreed that the general charge and determination of what expenditures shall be made to keep the railway bridges, buildings,

equipment and supplies of the party of the first part equal to the present condition of the same, and what additions thereto may be required by the increased business of the road, shall be confided to a managing agent, to be agreed upon by the Board of Directors of the two companies; and if they do not agree, to be appointed by the arbitrators herein mentioned; and if, in the opinion of either Board of Directors, the opinion and determination of said managaing agent is not satisfactory as to any of said matters, his decision as to the same shall be submitted to said arbitrators, whose decision thereon shall be final, and said manager is to act in accordance therewith. All expenditures authorized by said manager under the foregoing provisions are, upon his certificate, to be paid by the treasurer of the party of the first part from the funds he may receive from the income of the road and property. Said manager shall be removed from office on the request of either party, and a new one appointed; and he shall make no order for expenditure exceeding five thousand (5000) dollars, without the assent of some proper officer appointed by the directors of the party of the second part, except after arbitration had as aforesaid.

Said party of the second part shall and will, at all times during the continuance of this Indenture, indemnify and keep indemnified and harmless the party of the first part from all costs, suits, expenses, and damages which the party of the first part may sustain or incur by reason of any default or failure of the party of the second part, its grantees or its agents, in the operative management or use of the said railway and demised premises, or any part thereof, or in the use of any engine, car, article, or machinery of any kind in regard to which any claim for violation of any patent rights may be made, or in their omission to do and perform any act or thing which may be required by law to be performed by the party of the first part.

Said party of the second part will continue to do, during the continuance of this Indenture, every act and thing that may be by law required of or be obligatory upon it or said party of the first part in respect to the operation, condition, maintainance and use of said railway and property hereby demised, and every part thereof, including the keeping and rendition of all accounts and reports that shall be by law required, either making and returning the same to the authorities of the State, or furnishing all the data in its possession to enable the party of the first part to make the same; and in all cases as the law shall require in the premises.

Whereas said party of the first part has a contract with the New-London Northern Railroad Company for the use of its track from Norwich to New London, and of certain property at New London, which contract is of date of and to which reference

is hereby made for the terms and conditions of the same, said party of the first part does hereby agree to sell, assign, and transfer, and does hereby sell, assign and transfer the same to said party of the second part, with all the rights, grants and privileges therein contained and made to said party of the first part; and said party of the second part does assume said contract in the place and stead of said party of the first part, and agrees to keep and fulfil all things therein contained to be done, kept and performed by said party of the first part; said assignment subject to be avoided by the termination of this lease for any of the causes set forth herein.

And whereas said rights of said party of the first part terminate under said contract on the day of 187 , it is agreed by said party of the first part, that, if said party of the second cannot renew said contract, or make a like one with said New-London Northern Railroad Company on terms satisfactory to said party of the second part, within eighteen months from date, it may demand of the party of the first part to extend its railway from Norwich to New London on the side of said New-London Northern Railroad, under its present or any further powers; and said party of the first part agrees so to do, and to make as good a way as now exists by the present New-London Railroad, and also to procure as good and ample steamboat wharfage and buildings therefor at New London and connected with said new railway, as said party of the first part now occupies at said New London, and to have good title to all the same, and ready for use, at the termination of said contract with said New-London Northern Railroad Company; and then, and in such case, at said termination of said contract, said new railroad and steamboat wharf and buildings shall be included under this Indenture upon the same term of time and on the same conditions as the railway and buildings are leased aforesaid; and an additional sum in rent for the same shall be paid, equal to ten per cent. on the cost; and said party of the first part may issue of its capital stock to cover the expenditure; *provided*, however, that it shall be at the option of the party of the first part by itself to renew its lease, or make a new one, with equal rights to the present lease, with the New-London Northern Railroad Company, and transfer such renewal to said party of the second part, for the term of time this lease is to run; and in that case the party of the second part are to pay a rent on the same to the party of the first part eqal to ten per cent. on what would be the cost of the new railway wharf and buildings, which should furnish accommodations like those had under the lease, if the party of the first part had been obliged to build them; and for any allowance which should be made for any uses the New-London Northern Railroad Company shall have reserved under such new lease,

consideration is to be had in favor of said party of the second part; and if the parties hereto do not agree as to the amount to be paid under such renewal of lease, it shall be left to arbitration, as is provided for differences of opinion under this Indenture.

And it is further mutually agreed by and between the parties hereto, that, in case said party of the first part shall neglect or refuse to build said new road to New London when requested as provided aforesaid, or to procure a lease of the present road and appurtenances, and assign the said lease to said party of the second part as provided aforesaid, the new road may be built and the necessary wharves and so forth obtained by the party of the second part under any rights existing in said party of the first part, which said rights said party of the first part agrees to exercise for the party of the second part in the premises; and when built and obtained, said party of the second part may use the same for the term of this lease, paying all costs attending the same, and saving the party of the first part from all cotss, charges and liabilities of every name and nature attendant or consequent upon the building or using such new road and appurtenances. But this stipulation, or the building such new road under the same, shall not be construed or held to release the party of the first part from its obligations under this Indenture to build such new road, or to lease the present road, if called upon so to do, under the provisions herein contained.

Said party of the second part is to assume and pay, and does hereby assume and agree to pay, all the indebtedness and liabilities of said party of the first part, bonded and floating, as hereinafter provided; and it is mutually agreed that all sums due or to be due, and all amounts that shall accrue from date to said party of the first part from any sources of income, as well as that already accrued up to the commencement of possession by the party of the second part under this Indenture, shall be applied in liquidation of such floating debt; and any securities or stock, other than the steamboat stock aforesaid, of the corporation party of the first part, on hand or out as collateral, with any sinking fund, shall stand and be held for payment of said bonded debt. Said indebtedness of said party of the first part is to be provided for and paid in manner following: The floating debt is to be paid by the party of the second part, from any funds in the hands of the treasurer, if sufficient, as it falls due, or provide for the same from its own funds, in case of lack in the hands of the treasurer.

The interest on the bonded and mortgage debt and on the Massachusetts loan is to be paid by the party of the second part as aforesaid, when and as the same shall fall due. When the principal sum shall fall due on the Massachusetts loan, the sinking fund set over against the same shall be used in its payment; and if more than sufficient,

the balance shall belong to the party of the first part; and if not enough, the balance shall be paid by the sale of stock as herein provided. When any principal sum due by bond or mortgage-note of said party of the first part, shall fall due, the party of the first part, shall issue and sell such an amount of shares of its capital stock as may be necessary to pay the same; and for every share so issued said party of the second part shall pay, as additional rent for the demised railroad and property, the sum of ten (10) dollars, to wit: five (5) dollars in each July and January thereafter, in manner and form as rent is herein reserved to be paid.

And whereas there are outstanding ninety-four shares of the common stock of the company, party of the first part, never surrendered, and which, if returned, is entitled to the issue of one hundred and seventeen (117) shares in its stead, on the payment of two thousand three hundred (2,300) dollars, said party of the second part agrees, that, if said ninety-four shares are surrendered, and said two thousand three hundred (2,300) dollars are paid to said party of the second part, to be expended in betterments on the demised property, said party of the first part may issue said one hundred and seventeen (117) shares; and it will pay an additional semi-annual sum of five hundred and eighty-five ($585) dollars, on each July and January thereafter, as rent.

And whereas said party of the first part has contracts for business and other matters and things with sundry railroad and steamboat companies, and with persons and companies and corporations, it is agreed by and between the parties hereto, that all such contracts are to be, and that they are hereby assumed by said party of the second part, and that the said party of the second part will do, keep and perform all matters and things by said party of the first part to be done, kept and performed by such contracts and agreements, and save said party of the first part from all costs and charges and expenses on account of the same; and it is mutually agreed that said party of the second part shall have and receive all the payments, benefits, rights, or other things to be received or had by said party of the first part under or by virtue of any such contract or agreements.

If this indenture of lease shall become for any cause void or vacated or annulled, then all contracts herein and hereby agreed to be assigned to the party of the second part, and all contracts it may make in renewal, shall revert and become the property of the party of the first part; and said party of the second part shall, on request, make any such transfer or assignment as shall be proper and lawful to vest the same in said party of the first part. And when any contracts are made with the steamboat company herein referred to, they shall be made on terms not less favorable to said steamboat company than the present

contract between such steamboat company and the party of the first part. Any existing contract with the Boston and Albany Railroad Company may be cancelled or modified by the consent of said railroad company.

It is mutually stipulated, that, in case the parties hereto shall agree that any portion of the leased real estate which shall not be needed in the operation of the railway, or that if a change of location of track and station at Worcester or at any other place will be best for the public and the parties hereto, said party of the first part may sell and convey such portion of said real estate, agreed upon as aforesaid, and invest the proceeds in a fund to be known as the Improvement Fund; and such fund may be applied to the purchase of any new or changed line, or grounds and buildings, in the place and stead of those sold; and if, by such change, or purchase or construction of new buildings, a greater sum be required than is obtained from the sale of property as aforesaid, said party of the first part is to provide for and pay the same by issue of new stock or otherwise; and said party of the second part shall pay ten per cent. per annum on the amount of such expenditure, over and above the amount of funds in the Improvement Fund; and the new track, grounds, and buildings shall be included under this Indenture of lease for the same time and upon the same terms and conditions that the railway is herein leased.

Said party of the first part further agrees, that, during the continuance of the agreements herein, the party of the first part will maintain its organization and existence as a body corporate in due form of law; will elect a lawful board of directors, a president, secretary or clerk, and a treasurer; and such treasurer shall be satisfactory to said party of the second part, and shall employ proper and necessary clerks or assistants; and that said party of the first part will do and perform all such acts, matters and things, on request of the party of the second part, lawful and cosistent with the rights of the party of the first part and its public duty, as shall be proper and necessary to the due preservation and protection of all the property, estates, rights, franchises, and interests herein let and demised to said party of the second part, and to carry into effect the true intent and meaning of this agreement; and, in default thereof, that the same may be done by said party of the second part, so far as it can lawfully do the same, or by its agents, successors, or assigns, in the name and as the act of said party of the first part.

Said party of the first part agrees to do all lawful corporate acts and things upon request of said party of the second part, to enable it to make any additions to lands for the use of the demised railway, or to

enable said party of the second part to improve said railway in its curves, cuttings, embankments, or lines of sight, or depot, or other grounds; and said party of the second part may improve said railway in such respects, with the assent of said party of the first part, and all at its own cost and expense, under the advice, assent, and control of the General Railroad Commission of Connecticut, or the laws of the State in which the proposed improvements shall be located.

It is mutually stipulated between said parties, that, if any other or further acts need be done, or any other or further instrument, assignment, or paper shall need be made or executed, signed, sealed, or delivered by said party of the first part to insure to said party of the second part the use, enjoyment, income, or possession of any thing in this instrument agreed to be delivered to or had by said party of the second part, not inconsistent with the terms of the agreement, the act shall be done and instrument made: and so, in like manner, if any act shall need be done or instrument made by the party, of the second part, to insure to said party of the first part any thing in this instrument stipulated by the party of the second part, not inconsistent with, but under the terms of this contract, the act shall be done and instrument made on request.

The business in connection with the leased property shall be managed and conducted as follows, to wit: The party of the second part shall fix and determine the number and time of all trains to run on the leased railway, to fix all rates of passenger and freight transportation, employ and control all employees in connection with the business, and have control of the business done, or to be done, in connection with or on the leased property. The party of the second part agrees, that, in operating the said leased railway, it will furnish the public at least as good facilities, both in its passenger and freight department as is now enjoyed by the public or private persons upon or in connection with the leased estate, and especially will furnish to the cities of Worcester and Norwich, and the towns on the line of the road between said two cities, facilities for the transportation of passengers and freight, equal to or greater than they now enjoy upon the road. It shall have a person in general charge of the railroad and property, to be called the Managing Agent, who shall be a person satisfactory to the party of the first part. A true account shall be kept of all expenditures, earnings, and receipts of the business of said leased estates, substantially in the form and manner the same is now kept by the party of the first part; and such receipts shall be collected by said treasurer, to be chosen as above provided, of the agents or persons who may receive any of the same, or by himself, who shall, of his own motion, pay such expenditures as he knows correct, and such others as shall be ordered or ap-

proved by the managing agent; and shall, at the close of each month, make up his account, and render the same to said managing agent, and, on request, to either party hereto; and, after the payment of the monthly dues, shall make proper investment or deposit in bank, to the credit of a rent fund; and, on the first day of June and of December in each year, shall make up his semi-annual account, and statement of receipts and expenditures, and furnish it to the parties hereto; and of the balance on the first day of July and January in each year, pay to himself as treasurer, for the use and benefit of said party of the first part, such sum as shall then be due as rent under this Indenture; and the balance, if any, he shall pay over to the treasurer of the company, party of the second part. And if, on said first days of June and December, said treasurer shall find he has not sufficient funds in hand to pay the rent to accrue on the next pay-day, he shall give notice thereof in writing to the party of the second part, and it shall supply the deficiency to said treasurer before such pay-day shall arrive. The books, accounts, bills, and vouchers of said managing agent and said treasurer shall be at all times open to the examination of any person authorized by a vote of the directors of either corporation party hereto.

In determining the amount of moneys to be held and retained by the treasurer, of the receipts and collections by him made, at his monthly or other oftener or other settlements, it is agreed that he shall collect and hold: *First*, all receipts and earnings of the railway and leased property had from its own separate and proper business. *Second*, its proper proportion of all moneys earned and received by or from or under any contract now existing, or that may be made with any railroad or steamboat company, or other person or corporation. *Third*, from any business in connection with the party of the second part from its railroad leading from Putnam and Southbridge to Boston. The treasurer shall pay over to the party of the second part, and it shall be entitled to have and retain, such percentage as it would have received for business under the memorandum for a contract lately agreed between a committee of each company, and the balance of the joint business to be divided between the steamboat company and the treasurer, as was contemplated; and such memorandum shall be annexed hereto to show the division to be made. *Fourth*, all other earnings and receipts to be had and held by the treasurer to the semi-annual settlements.

The proper expenses attending the office of treasurer, such as salary, clerk-hire, &c., together with the proper expenses of keeping up the organization of the corporation party of the first, and all expenses attendant upon any arbitration under this Indenture, is to be paid by the party of the second part.

It is mutually agreed, that, in case any difference of opinion shall

arise between the parties hereto, as to the lawful and proper construction of this Indenture, or of the duty of either party under the same, and either party shall, in writing, state its claim, and the same shall be denied, refused, or postponed by the other party, either party may thereupon demand that the matter be submitted at once to arbitration, and it shall be done; and thereupon the matter shall be submitted to the arbitration and award of Francis H. Dewey and Thomas E. Graves, who shall at once hear the parties and decide the same; and if they do not agree, Emory Washburn shall at once be associated with them; and the written award of either two of said arbitration in the premises shall be final and conclusive.

And in case either of said persons named as arbitrators shall decease, or decline to serve, or from absence or other cause unable to do so, or it shall not be practicable to obtain his services, the parties hereto may agree upon some person in his stead, who shall have the same power and authority; but and if the parties do not and cannot or will not agree, then either party may apply to any Judge of the Superior Court in Connecticut or in Massachusetts, who, on proper and reasonable notice to the parties hereto, is requested and empowered to appoint an arbitrator in the place and stead of such person or persons as may not serve for any of the causes aforesaid; and thereupon the arbitration shall proceed as if the above persons should or could serve.

The parties hereto mutually stipulate, each with the other, that all promises and agreements made to or by one party to the other party to this instrument shall extend to and operate for the benefit of the successors of the party to whom or for whose benefit such agreement or promise is made.

This Indenture is made subject to the ratification and approval of the stockholders of said corporation parties hereto, at meetings lawfully called for such purpose.

In Witness Whereof, the said several corporations have, by their Presidents, thereto authorized, severally hereto set its signature and affixed its corporate seal in attestation thereof, this day and year first above written.

Signed, sealed, and delivered in presence of

Witnesses to B. H. & E. } THOMAS E. GRAVES, H. C. RICE.

Witnesses to N. & W. } H. C. RICE, THOMAS E. GRAVES.

The Norwich and Worcester Railroad Company,
By A. F. SMITH, *President.*

Boston, Hartford and Erie Railroad Company,
By JOHN S. ELDRIDGE, *President.*

STATE OF CONNECTICUT, }
COUNTY OF NEW LONDON. } *ss.*

Norwich, Feb. 9, 1869.

Then and there before me, John T. Wait, a Notary Public, duly commissioned and authorized by the Governor and under the laws of the State of Connecticut to take the acknowledgment and proof of deeds and other instruments in writing under seal, personally appeared the above named Norwich and Worcester Railroad Company, by Alba F. Smith, their President, and acknowledged the foregoing instrument to be their and his free act and deed.

In witness whereof, I have hereunto set my hand and
[L. S.] affixed my seal of office, at said Norwich, in said County of New London, on the day and year above written.

JOHN T. WAIT,
Notary Public.

STATE OF CONNECTICUT, }
COUNTY OF NEW LONDON. } *ss.*

Norwich, Feb. 9, 1869.

Then and there before me, John T. Wait, a Notary Public, duly commissioned and authorized by the Governor and under the laws of the State of Connecticut, to take the acknowledgment and proof of deeds and other instruments in writing under seal, personally appeared the above named Boston, Hartford and Erie Railroad Company, by John S. Eldridge, their President, and acknowledged the foregoing instrument to be their and his free act and deed.

In witness whereof, I have hereunto set my hand and
[L. S.] affixed my seal of office, at said Norwich, in said County of New London, on the day and year above written.

JOHN T. WAIT,
Notary Public.

COMMONWEALTH OF MASSACHUSETTS.—SUFFOLK, *ss.*

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the foregoing is a true copy of the Bill of Complaint in the suit in Equity of George Ellis *et al.*, *v.* Boston, Hartford and Erie Railroad Company, *et al.*, pending in said Court.

In witness whereof, I have hereto set my hand and affixed
[L. S.] the seal of said Court this twenty-sixth day of May, A. D. 1881.

JOHN NOBLE,
Clerk.

COPY.

COMMONWEALTH OF MASSACHUSETTS.—SUFFOLK, *ss.*

SUPREME JUDICIAL COURT.

IN EQUITY.

GEORGE ELLIS AND OTHERS,
against
THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, AND OTHERS.

And now on this first day of March, A. D. 1871, it appearing to the Court that the Boston, Hartford and Erie Railroad Company, one of the defendants in this cause, has been duly served with process and has appeared thereon, that the time for filing its answer to the bill of complaint has long elapsed, and that no answer has been filed on its behalf in said cause, on motion of Brooks and Ball, solicitors for complainants, it is ordered that the bill of complaint as against the said defendant. The Boston, Hartford and Erie Railroad Company be taken as confessed.

COMMONWEALTH OF MASSACHUSETTS.—SUFFOLK, *ss.*

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the within is a true copy of the order taking the bill *pro confesso*, as against the Boston, Hartford and Erie Railroad Company in the suit in Equity of George Ellis *et al. v.* Boston, Hartford and Erie Railroad Company, *et al.*, pending in said court.

[L. S.] In witness whereof I have hereto set my hand and affixed the seal of said court this twenty-sixth day of May, A. D. 1881.

JOHN NOBLE,
Clerk.

COPY.

SUPREME JUDICIAL COURT.—SUFFOLK, *ss.*

GEORGE ELLIS *et als*, in Equity,

vs.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, *et als.*

DECREE APPOINTING RECEIVERS, &c.

This cause came on to be heard on the application of the complainants for the appointment of Receivers of all and singular the property of the Boston, Hartford & Erie Railroad Company, Brooks & Ball appearing as counsel for the complainants and sundry other bondholders, J. G. Abbott, Esq., appearing as counsel for said company, Henry W. Paine, Esq., appearing as counsel for John S. Eldridge, John P. Healy, Esq., appearing as counsel for Thomas Talbot and Moses Kimball, and being fully heard and the Attorney General of the Commonwealth being present at the hearing and interposing no objection to the following decree, and it appearing to the Court that it is necessary for the care and preservation of the property of said Company that the said property be placed in the hands of Receivers subject to the further orders of the Court from time to time as occasion may render necessary or proper.

It is now on this second day of August, A. D. eighteen hundred and seventy, ordered, adjudged and decreed by the Court with the consent of all the parties above named and heard before the Court as aforesaid, that James W. Converse, Otis Norcross and Thomas W. Pierce, all of Boston in said County of Suffolk, and George Talbot Olyphant of the City, County and State of New York, and George M. Bartholomew of Hartford in the State of Connecticut, be and they hereby are appointed Receivers in this cause, with full power and authority to enter upon and take possession of all and singular the railways of said Boston, Hartford & Erie Railroad Company, together with all of its lands, tracks, lines, rails, bridges, ways, depots, stations, water tanks, shops, buildings, piers, wharves, locomotives, cars, erections, fences, fixtures, privileges, franchises, rights, leases, charters, leasehold estates, leasehold rights, and property, and all and singular all other property, real and personal, corporeal and incorporeal, of the said Boston, Hartford & Erie Railroad Company and the earnings and income thereof and

therefrom, including all the moneys, credits, choses in action, evidences of debt, books, deeds, leases, contracts, papers and vouchers of said Boston, Hartford & Erie Railroad Company by whatsoever name the same may be known or designated, and the same to demand, collect and receive by suit or otherwise, and with said moneys and other moneys which shall be received by said Receivers in their said capacity, said Receivers in the exercise of the corporate rights of said Boston, Hartford & Erie Railroad Company shall maintain and keep in repair the said railroads and operate and carry on the same, or such part thereof as may be practicable and for the interest of all parties concerned and receive the income from and earnings thereof.

And to this end, the officers, agents and employees of said Boston, Hartford & Erie Railroad Company having the custody, possession, care or control of said property so to be taken possession of by said Receivers or of any part thereof, are hereby ordered and required forthwith upon the request of said Receivers to surrender, give up and deliver the same to said Receivers, their agents and employees, and the legal possession and control of all said property shall vest immediately in said Receivers.

And said Receivers are empowered to retain and employ such legal counsel and attorneys, agents, servants, laborers, accountants, clerks and assistants as they may deem necessary in the performance of their duties as such Receivers, and to these ends and for these purposes to appropriate, apply and use the moneys aforesaid together with the current earnings of said railroads and the income of and from said property so far as the same shall be necessary, and to enter into contracts for obtaining supplies to operate said railroads and for sustaining, keeping or putting the same, and the equipment thereof in proper repair and condition, and to rebuild or repair bridges, buildings or structures, and put up turn tables and other structures necessary and proper for the advantageous and economical working of said railroads and the transaction of their business.

That said Receivers be authorized to settle, adjust and satisfy all legal and just claims for damages or injuries to persons or property that may be claimed against them incurred while such Receivers, and they are hereby authorized to pay the same from moneys in their hands as such Receivers.

That they enter at once upon and take and retain possession of the offices of said Company, and of all the property, deeds, leases, contracts, books, papers and vouchers of which they are hereby appointed Receivers.

That said Receivers acting in good faith under this order without negligence and in the exercise of reasonable and ordinary prudence and

care shall not be answerable out of their own estates or property for any breach of any contract which may be entered into by them as such Receivers in the execution of the powers herein vested in them, or for any injury to the person or property of third persons by accident in the prosecution of the business, or by the negligence of others employed by said Receivers, and in regard to all such breaches of contract and damages to persons and property of third persons, and for the just protection of said Receivers generally, and their indemnity against all their liabilities and contracts as such Receivers, the moneys which may be in the hands of said Receivers, together with the proceeds or product of the business to be carried on as aforesaid, shall be held to be applied as may be ordered or approved by the Court.

It is also further ordered that said Receivers shall without unnecessary delay upon entering upon their duties as such, make an inventory in detail of property which shall come into their hands as such Receivers with an apt description or designation of the same, also of all choses in action and evidences of debt due or owing to said Company from third persons, and of all moneys on hand at the time of so taking possession by them, said Receivers, and file said inventory in this cause in the office of the Clerk of this Court within ninety days from the date of this order duly verified under oath by them.

They shall also keep in systematic order, full, true and accurate accounts of all their receipts and disbursements, including all receipts and disbursements made by their employees or agents, and they shall, within thirty days after the close of each month during the continuance of this trust, and oftener, if required by the Court, file in the office of the Clerk of this Court, duly verified under oath as aforesaid, a statement for such month of their aggregate receipts and disbursements during that month, including the receipts and disbursements of their employees or agents, and a like statement of all liabilities incurred by them during the same period which shall remain unsatisfied, and also of all liabilities incurred by them during the time of the trust remaining unpaid, and such other accounts and statements as may be necessary to a clear understanding of the condition and administration of the trust in their hands during the period covered by such report, and a discrimination shall be made by said Receivers in said statements or reports between receipts arising from their prosecution of the business and those from other sources.

Said Receivers are also hereby authorized, at their discretion, to dismiss from service any agent or employee of said Company other than the President, Directors, Treasurer, Assistant Treasurer, Secretary or Clerk of said Company, and from time to time to fill the vacancy as occasion may require.

And said Receivers are hereby authorized to pay and discharge out of any moneys which shall be in their hands as such Receivers any sums due from said Boston, Hartford & Erie Railroad Company for labor performed after the first day of June last in operating its road or supplies or materials furnished the said Company after that day for operating its road including all salaries due or payable by said Company to its officers for services performed by them for said Company since said first day of June and also such sums not exceeding three thousand dollars as shall be necessary to obtain possession of any books or papers of said Company.

And it is hereby further ordered that said Receivers shall be at liberty to pay from time to time as the same shall become payable if they shall think it expedient and proper so to do any and all sums for insurance on the property and all sums hereafter incurred in prosecuting or defending suits by or against said Company or by or against said Receivers or by or against the persons claiming to be Trustees under the mortgage made by said Company to Robert H. Berdell, Dudley S. Gregory and J. C. B. Davis, also any and all sums which it may be necessary to pay to preserve or protect any leasehold interests or leasehold rights or other rights or any property, easements or rights of way of said Boston, Hartford & Erie Railroad Company including any and all taxes and legal assessments and also including any and all sums now due or payable or hereafter due or payable by the Boston, Hartford & Erie Railroad Company under the Indenture of lease made between the Norwich & Worcester Railroad Company and said Boston, Hartford & Erie Railroad Company dated on the ninth day of February, A. D. eighteen hundred and sixty nine, a copy of which is annexed to the Bill of Complaint in this cause.

And said Receivers may borrow for the purpose of preserving the rights of said Boston, Hartford & Erie Railroad Company under said last mentioned lease and for the other purposes aforesaid not exceeding one hundred thousand dollars at such rate of interest as the said Receivers may deem proper and in order to secure the repayment with interest of all sums so barrowed by them may mortgage or pledge the earnings of said Railroads and the income from the property of said Company and the said last mentioned lease itself, and the moneys so borrowed by said Receivers shall be held to be the Receivers' indebtedness in their official capacity as Receivers, and as such shall constitute a first and paramount lien over all other liens and incumbrances on said earnings, income and lease and as such be first paid.

And it is further ordered that the injunction heretofore issued in this cause be and the same is hereby continued until the further order of the Court, and it is also ordered that the defendants and each of

them, their officers, agents, employees, servants, counsellors and attorneys be further restrained and enjoined from interfering in any manner with any of the property, books, papers and vouchers aforesaid except to deliver and surrender the same into the hands of said Receivers.

And it being requested by all parties that said Receivers should not be required to give bond in any greater sum it is further ordered that each of said Receivers within twenty days from the date hereof give his several bond in the penal sum of twenty-five thousand dollars, to the Clerk of this Court as obligee and his successors in said office, with two sureties to the satisfaction of said Clerk or the assistant Clerk of this Court; said bond to be for the benefit of all persons concerned and to be conditioned for the faithful performance by such Receiver of his duties as such.

But nothing herein contained shall be construed to preclude the officers and stockholders of said Boston, Hartford & Erie Railroad Company from free access to and use of the stock books, transfer books and certificate books of said Company and the Records of the stockholders and Directors of said Company or preclude said officers or stockholders or the persons claiming to be Trustees under the mortgage so made to Robert H. Berdell, Dudley S. Gregory and J. C. Bancroft Davis from free access to and examination of all the account books and other books, papers and vouchers of said Company at reasonable times or preclude the proper officers of said Company from recording transfers of stock or issuing new certificates in proper cases, which they, said officers, are hereby directed to record, make and issue accordingly, and all said stock books, transfer books, certificate and account books, papers and vouchers, except such as are ordinarily used on the line of the road and at stations, shall until otherwise ordered by the Court be kept at the principal offices of said Receivers in Boston.

And said Receivers shall also pay out of any moneys which may be in their hands as such Receivers such sum not exceeding eight hundred dollars per month as in their judgment may be necessary or proper to keep up the corporate organization and existence of said Boston, Hartford & Erie Railroad Company and to pay the salaries of the necessary officers of the Corporation for that purpose and the rent of the necessary offices therefor.

And any or all of said Receivers may be removed at any time by this Court and whenever a vacancy shall occur from any cause in the Receivership the same may be filled by the Court and until so filled the remaining Receivers shall have and exercise all the powers which are herein conferred upon all of the Receivers.

And it is further ordered that a certified copy of this decree be published once in each of three successive weeks in some newspaper printed

in each of the following cities, to wit, Boston, New York, Providence and Hartford, the first publication to be made as soon as may be.

And either party may apply from time to time to this Court for further orders, directions or instructions as occasion may require.

By the Court.

August 2, 1870. (Signed) GEO. W. NICHOLS. Asst. Clerk.

COMMONWEALTH OF MASSACHUSETTS.—SUFFOLK, *ss.*

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the foregoing is a true copy of the Decree appointing Receivers in the suit in equity of George Ellis, *et al. v.* Boston, Hartford and Erie Railroad Company, *et al.*, pending in said Court.

[L. S.] In witness whereof I have hereto set my hand and affixed the seal of said Court this twenty-sixth day of May, A. D. 1881.

JOHN NOBLE,
Clerk.

COPY.

SUPREME JUDICIAL COURT.—SUFFOLK, *ss.*

GEORGE ELLIS *et als.*, in Equity,
vs.
THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY *et als.*

This Court on the twenty-fourth day of April, A. D. eighteen hundred and seventy-one, having decided and decreed that Moses Kimball of Boston, Thomas Talbot of Billerica, and Avery Plumer of Boston, are in law the present Trustees under the mortgage referred to in the Bill of Complaint in this cause, made by the Boston, Hartford & Erie Railroad Company to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, dated on the nineteenth day of March, A. D. eighteen hundred and sixty-six.

It is now on this ninth day of May, A. D. eighteen hundred and seventy-one, ordered, adjudged and decreed by the Court that upon the payment by said trustees or their succesors in office to the parties in this cause, of their reasonable expenses and counsel fees in this cause, and upon the payment to said receivers by said trustees or their successors of all sums of money which said receivers have theretofore advanced or borrowed under the order of this Court, including what they have borrowed of Elisha S. Converse (not theretofore repaid) with interest thereon from the times when the same were advanced or borrowed, and of a proper compensation to the receivers for their services, and upon payment by said trustees or their successors in office of all debts and liabilities and damages so far as the same can be now fixed and ascertained, which have theretofore been incurred by said receivers, or which they theretofore have become liable for except the certificates of indebtedness which have been or may be hereafter issued under and in pursuance of the decree of said Court dated December 23rd, 1870, and secured by an instrument of mortgage or pledge executed by said receivers in pursuance of the decree last mentioned, and William T. Hart, bearing date January twentieth, A. D. 1871, and also except the contract between said receivers and Norman C. Munson, dated January 20th, A. D. 1871, described in said instrument of mortgage or pledge, copies of which instrument and contract are filed in said cause, and upon securing, by said trustees, of the payment of all such debts, liabilities and damages, except as aforesaid, which may be contingent or unliquidated to the satisfaction of said receivers, or in pursuance of an order of this Court to be hereafter made, therefor in this cause. All said sums and claims to be ascertained and determined as hereinafter provided, by the Master appointed by this decree; the receivers in this cause, deliver into the possession and control of said trustees or their successors in office, all the roads, railways, property and franchises which they, the said receivers, have in their hands or possession or under their management or control as such receivers.

And it is further ordered, adjudged and decreed, that the said Trustees or their successors in office, upon being put in possession as aforesaid shall, as such trustees, have the right, power and authority, by themselves, their officers, agents and employees to take, receive and operate all said railways, roads, property and franchises, and receive and have the rents, earnings, income and profits thereof and therefrom, and to use and apply such part of said rents, income and profits as shall in their judgment be necessary to the payment of the running and operating expenses of the said railways and roads, including the necessary repairs of road, road-bed, buildings, machinery and equip-

ment, and all expense of agents, clerks, officers, employees and laborers and all claims for damages against said trustees or their successors in office, and to the payment for insurance and taxes on the property and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvements of said roads, buildings, machinery and equipments, as the business shall in their judgment require, and to the payment of any and all claims, if any, necessary to secure and assure to them the estate and franchises conveyed by said first mentioned mortgage and to their own compensation and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a Court of Equity in a case of a Receiver as settled and established in the case of the Receivership of the New York and Erie Railroad.

And said Trustees or their successors in office, shall keep full and accurate accounts of all sums received or paid out by them, which shall at all reasonable times be open to the inspection of said Boston, Hartford & Erie Railroad Company and of the holders of bonds secured by said first mentioned mortgage, and said trustees or their successors shall, at least once a year, publish abstracts thereof for the use of the holders of said bonds.

And said Trustees or their successors in office, upon taking possession as aforesaid, shall file in the office of the Secretaries of State, of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a Notary Public, that they have taken possession of said mortgaged property, franchises and estate for default in the payment of the interest on said bonds and with their purpose to foreclose said first mentioned mortgage for said default.

And if default in the performance of the condition of that mortgage shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises conveyed by that mortgage shall vest absolutely and in fee in said trustees and their successors in office without further assurance and without further process of law, and all right or equity of redemption of said Boston, Hartford & Erie Railroad Company therein shall be forever barred and foreclosed; but if the whole of the principal and interest of said bonds in arrear with interest thereon when the same may by law be demanded and the lawful claims, disbursements and liabilities of said trustees and their successors in said office which may be made or incurred on account of their trust, and all the certificates of indebtedness aforesaid and a proper compensation to the trustees and their successors for services shall be paid and satisfied within said period of eighteen months after said notice shall have been filed, either by said Boston,

Hartford & Erie Railroad Company or out of the net earnings of the property in the possession of the trustees or their successors, then said trustees and their successors shall render to said Boston, Hartford & Erie Railroad Company possession of said mortgaged property, franchises and estate and of all the additions made by them thereto, and said Boston, Hartford & Erie Railroad Company shall thereupon become entitled to the possession thereof without further assurance, but still subject to said first mentioned mortgage so far as the bonds secured thereby then remain unpaid.

But said Trustees and their successors shall take the property, estate and franchises aforesaid subject to the lien, mortgage and pledge created by said receivers by said instrument dated January 20th, A. D. 1871, and also subject to said contract between said receivers and said Munson, which contract is hereby declared valid and binding upon said trustees as trustees but not personally, and which lien, pledge and mortgage are hereby declared to be in full force and a paramount lien as set forth in said Decree of this Court, passed December 23rd, 1870.

Provided, however, that in case upon the coming in of the report of the Master in this cause hereinafter ordered it shall appear to the Court expedient that a foreclosure of said mortgage shall take place by sale of the mortgaged property or otherwise within said period of eighteen months in such manner as this Court shall order, nothing in this decree contained shall be construed to preclude any party to this cause from making application for such other and earlier foreclosure of said mortgage or this Court from passing the proper orders and decrees therefor.

And until the full payment and satisfaction or securing of all sums of money advanced or borrowed by said receivers, as aforesaid and of all debts, liabilities and damages incurred by them as aforesaid and of all costs, expenses, counsel fees and compensation as above provided the said receivers shall retain and keep absolute possession of all the property of said Boston, Hartford & Erie Railroad Company heretofore passed into their possession under the order of this Court appointing them Receivers, and the same shall be continued in their hands and possession and under their management and control as such Receivers.

And said Trustees and their successors shall make a report under oath to this Court as often as once in every six months of their receipts and expenditures as such trustees.

And Horace H. Coolidge, as Master in Chancery of this Court, is hereby appointed to ascertain and report to this Court all sums of money which are to be paid by said Trustees to said Receivers, including all sums of money which said Receivers have theretofore advanced or borrowed under the order of the Court, including what they have

borrowed of Elisha S. Converse (not theretofore repaid) with interest thereon and all debts, liabilities and damages as far as the same can be now fixed and ascertained, which have been incurred by said Receivers, (except as aforesaid) and a proper compensation to the Receivers for their services and also all expenses, costs and counsel fees, which have been incurred in the prosecution of this suit by the several parties thereto, to be allowed to said parties, and also as nearly as may be to ascertain and report the amount of liabilities contingent and unliquidated incurred by said Receivers for which they are in any way liable; to be secured as hereinbefore ordered and the form, manner and amount and sufficiency of such security. And said Master is further ordered to report to this Court the results of the operation of the railroad in the possession of said Receivers during the time the same has been in their possession and the amount of the receipts and expenditures of said Receivers during said period and the condition of the property in their possession.

And said Receivers are continued in office until the further order of this Court.

And either party may apply to the Court for further order or direction as occasion may require.

By the Court,

(Signed,) GEO. C. WILDE,
Clerk.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *ss.* :

I, John Noble, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the foregoing is a true copy of the Decree for Foreclosure in the suit in Equity of George Ellis *et als, v.* Boston, Hartford and Erie Railroad Co. *et als,* pending in said Court.

[L. S.] In witness whereof I have hereto set my hand and affixed the seal of said Court this twenty-sixth day of May, A. D. 1881.

JOHN NOBLE,
Clerk.

COMMONWEALTH OF MASSACHUSETTS—SUFFOLK, *ss.*

SUPREME JUDICIAL COURT.

IN EQUITY.

George Ellis *et al.*, *vs.* Boston, Hartford and Erie Railroad Company *et al.*

AGREED FACTS.

In the above entitled cause the following facts are agreed, viz. :

1. That the plaintiffs named in the original bill filed in said cause, and James C. Ayer who has been made a party plaintiff therein are severally the owners of the bonds set forth in said bill and in the petition of said Ayer, and of the unpaid and overdue interest warrants upon said bonds as therein set forth.

2. That the Boston, Hartford and Erie Railroad Company is a corporation created and doing business in this Commonwealth as set forth in said bill.

3. That on or about the 19th day of March, 1866, said corporation executed and delivered the mortgage of that date to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, Trustees, set forth in said bill, and a copy whereof is thereto annexed to secure the bonds therein named to be issued by said corporation.

4. That said mortgage has been ratified and confirmed by the Legislature of Massachusetts by Act of April 12, 1866, Chapter 142, and by special acts of the Legislature of the several states of New York, Connecticut and Rhode Island, and has been duly recorded.

5. That thereafterwards said corporation issued all of the twenty thousand bonds named in said mortgage, except one, and that the same are now wholly or in great part owned by bona fide holders thereof.

6. That said corporation made default in the payment of the interest warrants upon a large amount of said mortgage bonds which fell due January 1, 1870, July 1, 1870, and January 1, 1871, and that the same are still in default and unpaid.

7. That on the 27th day of February, 1867, said Berdell by an instrument in writing of that date by him signed and delivered to said Gregory and Davis, resigned his place as trustee under said mortgage, and thereafterwards on the 28th day of October, 1867, the said Gregory

and Davis, the remaining trustees, by an indenture under seal of that date between said Gregory and Davis of the first part, and John S. Eldridge and said Gregory and Davis of the second part, appointed said Eldridge a trustee under said mortgage in place of said Berdell, and conveyed to said parties of the second part, all the property and estate which were by said mortgage conveyed to the trustees therein named, upon the same trusts and conditions, and for the same purposes and uses as in said mortgage set forth; and that said Eldridge became a party to said indenture, and accepted the trusts therein created; and that the copies of said written resignation of said Berdell, and of the said indenture of October 28th, 1867, annexed to the answer of Thomas Talbot and Moses Kimball in this cause are true and correct, and that said resignation and indenture were recorded in the Counties of Suffolk, Norfolk and Worcester in this Commonwealth, and in the office of the Secretary of State, of the States of Rhode Island and Connecticut, as shown by said copy annexed to said answer.

8. That on or about December 1, 1868, said Gregory and Davis by an instrument in writing, under their hand and seal of that date, delivered to said Eldridge, resigned their places as trustees under said mortgage, and conveyed to said Eldridge as sole remaining trustee, all their right, title and interest in and to the mortgaged premises, and that said Eldridge on or about August 16, 1869, by an indenture under seal of that date, between said Eldridge of the first part, and said Eldridge and Mark Healey, and Henry N. Farwell of the second part, appointed said Healey and Farwell to be trustees in place of said Gregory and Davis, and conveyed to said parties of the second part, all the property and estate which were by said mortgage originally conveyed to said Berdell, Gregory and Davis, and upon the same trusts and conditions, and for the same uses and purposes in said mortgage set forth; and that said Healey and Farwell became parties to said indenture, and accepted said trusts; and that the copies of said written resignation of said Gregory and Davis, and of said indenture of August 16, 1869, annexed to said answer of said Talbot and Kimball are true and correct.

9. That on or about March 16, 1870, said Healey and Farwell by an instrument in writing of that date, under their hand and seal resigned their places as trustees under said mortgage, and conveyed to said Eldridge as sole remaining trustee under the same, all the right, title and interest in and to the mortgaged premises, and that said Eldridge as such sole remaining trustee, by an indenture under seal of that date between himself as party of the first part, and Thomas Tal-

bot and Moses Kimball of the second part, appointed the said Talbot and Kimball trustees in place of said Healey and Farwell, and conveyed to said Talbot and Kimball, the estate and property by said mortgage deed conveyed to said Berdell, Gregory and Davis, to be held by said Talbot and Kimball jointly with said Eldridge, upon the trusts and conditions, and for the uses and purposes set forth in said mortgage, and that said Talbot and Kimball became parties to said indenture and accepted said trust, and that the copies of said written resignation of said Healey and Farwell, and of said indenture of March 16, 1870, annexed to the answer of said Talbot and Kimball in this cause are true and correct.

10. That thereafterwards, on or about March 16, 1870, said Eldridge by an instrument in writing of that date, under his hand and seal, resigned his place as trustee under said mortgage, and conveyed to said Talbot and Kimball as remaining trustees under said mortgage, all his right, title and interest in the mortgaged premises; and thereafter on or about July 25, 1870, by an instrument under seal of that date, between said Talbot and Kimball of the first part, and Avery Plumer of the second part, said Talbot and Kimball appointed said Plumer trustee under said mortgage in place of said Eldridge, resigned, and conveyed to said Plumer jointly with themselves, the estate and property originally conveyed by said mortgage deed to said Berdell, Gregory and Davis, to be held upon the trusts declared in said mortgage, and that said Plumer became a party to said indenture and accepted said trust, and that the copies of said resignation of said Eldridge, and of said indenture of March 16, 1870, annexed to said answer of said Talbot and Kimball are true and correct.

11. The said Eldridge at the time of his appointment as trustee under said mortgage as aforesaid, was President and Director of said corporation, and continued to hold said office until his resignation of said trust, that said Berdell, Gregory at the date of said mortgage were directors in said corporation, and that said Farwell and Healey at the time of their apointment as aforesaid, and until their resignation of said trust, were directors of said corporation.

12. That no action has at any time been taken by the holders of the bonds secured by said mortgage, or by any Court whatsoever, accepting or confirming the resignation of said Berdell, Gregory, Davis, Healey, Farwell, Talbot, Kimball or Plumer, or the several conveyances and indentures above set forth, and that no objection has at any time been made by any of the holders of said bonds to any of said resignations,

appointments, conveyances or indentures, until the filing of this bill, but the validity thereof is not admitted by the complainants, but denied.

13. That none of the bonds secured by said mortgage were issued by said corporation until after the resignation of said Berdell, and only a small proportion of said bonds, about one million of dollars, were issued before the appointment of said Eldridge as trustee as aforesaid, and that all the remaining bonds were issued before the resignation of said trust by said Eldridge. Neither said Kimball, Talbot or Plumer ever took any action as trustees under said mortgage except as hereinbefore stated.

14. The Receivers in this cause object to any surrender of the property held by them to the trustees or otherwise, until all loans made, and all debts and liabilities contracted by them or either of them as Receivers, and all their just charges for services as Receivers, shall have been paid.

J. P. HEALEY,
For Talbot, Kimball and Plumer, *Defendants.*
J. G. ABBOTT,
For Boston, Hartford and Erie Railroad Company.
BROOKS & BALL,
Attorneys for Ellis and Bolles, *Plaintiffs.*
WM. G. RUSSELL,
For J. C. Ayer.
EDWARD L. PIERCE,
Counsel for the Commonwealth.

At Chambers in Boston, March 1, 1871, heard and reserved upon the bill, answers and replications, and the above agreed statement of facts for the consideration and determination of the full Court. All the orders and decrees heretofore passed in this cause are to be made part of this report.

HORACE GRAY, JR., JUSTICE.

The above agreement is authorized by me.

GEORGE ELLIS.

ORDER OF NOTICE AND INJUNCTION.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
At Chambers, July 20, 1870.

GEORGE ELLIS, ET. AL. IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

And now on this twentieth day of July, A. D. eighteen hundred and seventy, it is ordered in the above entitled cause that the defendants therein be forthwith notified to appear before some justice of this court at the court house in Boston, in the county of Suffolk, on the twenty-third day of July, current, at nine o'clock A. M., to show cause if any they have, why an injunction should not issue as prayed for in said bill, and why a Receiver should not be appointed as therein prayed, and that in the meantime an injunction issue, restraining and enjoining until the further order of this court or of some justice thereof, the Boston, Hartford and Erie Railroad Company, its president, directors, officers, agents, servants, attorneys and counsellors, and each and every of them, from making or issuing any bonds of said Boston, Hartford and Erie Railroad Company, under the resolution of the Legislature of the State of Connecticut, or otherwise, and from making any mortgage or incumbrance upon any part of the franchise, rights or property of said Boston, Hartford and Erie Railroad Company, and that the defendants at the place, day and hour above specified be at liberty to show cause against the further continuance of this injunction.

HORACE GRAY, JR., *Justice.*

PETITION OF SIDNEY DILLON, TO BE MADE A PARTY DEFENDANT.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed August 2, 1870.

GEORGE ELLIS ET AL., IN EQUITY, *vs* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

To the Honorable the Justices of the Supreme Judicial Court.

Respectfully represents the undersigned and informs your Honors, that he is an owner of a portion of the bonds described in the Bill of complaint, that he is also a creditor of said corporation to a large amount for the recovery of which he has commenced suits against said corporation and attached its property, that he refuses to become party

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plaintiff to said bill, and he prays this Honorable Court to be made a party Defendant to said suit.

SIDNEY DILLON,
By S. BARTLETT, *his Att'y.*

[ORDER ON THE FOREGOING, ADMITTING SIDNEY DILLON AS A PARTY DEFENDANT.]

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
At Chambers in Boston, August 2, 1870.

On the foregoing petition it is ordered and decreed that the said Sidney Dillon be, and he hereby is, admitted a party defendant in said suit, according to the prayer of his petition.

By the order of HORACE GRAY, Jr., Esq., one of the Justices of said Court.

GEO. C. WILDE, *Clerk.*

AMENDMENT OF BILL.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed August 2, 1870.

GEORGE ELLIS ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

And now, upon the filing of the application or petition of Sidney Dillon this day, in the above entitled cause, stating that he refuses to become party plaintiff to the bill in this cause, and prays to be made a party defendant thereto, and the court having ordered him to be made a party defendant thereto, the complainants come and amend their said bill as follows, to wit: by inserting the words "and said Sidney Dillon" after the words "when ascertained" and before words "may answer" in the twentieth line of the twenty-eighth page of said bill, and by inserting after the name "Kimball" in the second line of the twenty-ninth page of said bill the words "and said Dillon."

BROOKS & BALL,
Solr's for Compl'ts.

[ORDER ON THE FOREGOING.]

AT CHAMBERS IN BOSTON,
August 2, 1870.

And now it is ordered and decreed that the above amendment be and the same is hereby allowed.

By the order of HORACE GRAY, Jr., Esq., one of the Justices of said court.

GEO. C. WILDE, *Clerk.*

BOND OF JAMES W. CONVERSE.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed August 4, 1870.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

KNOW ALL MEN BY THESE PRESENTS, That we, James W. Converse of Boston in the County of Suffolk and Commonwealth of Massachusetts, as principal, and George Everett of Dedham in the County of Norfolk, and Matthew Bolles of said Boston, as sureties are holders and stand firmly bound and obliged unto George C. Wilde of said Boston Clerk of the Supreme Judicial Court of Massachusetts in and for the County of Suffolk—in the full and just sum of twenty-five thousand dollars to be paid unto the said George C. Wilde, Clerk as aforesaid and his successors in said office or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the second day of August in the year of our Lord one thousand eight hundred and seventy.

The condition of this Obligation is such, that whereas in and by a Decree of the Supreme Judicial Court of Massachusetts held at Boston within and for the County of Suffolk on this second day of August made in the suit of George Ellis *et al.*, *vs.* The Boston, Hartford and Erie Railroad Company *et als.* pending in said court James W. Converse, Otis Norcross and Thomas W. Pierce all of said Boston and George Talbot Olyphant of the said County and State of New York and George M. Bartholomew of Hartford in the State of Connecticut, were appointed receivers of all and singular the property of the Boston, Hartford and Erie Railroad Company with the powers, authorities and duties in said Decree set forth; and Whereas in and by said Decree it is ordered that each of said receivers within twenty days from said

date of said Decree give his several bond in the penal sum of twenty-five thousand dollars to the Clerk of said Court as obligee and his successors in said office with two sureties to the satisfaction of said Clerk or the Assistant Clerk of said Court, said bond to be for the benefit of all persons concerned and to be conditioned for the faithful performance by such receiver of his duties as such ;—Now therefore if the above bounden James W. Converse shall well and faithfully perform each and all his duties as receiver as aforesaid, then this obligation shall be void, otherwise shall remain in full force and effect.

In presence of
HENRY LUNT to all the signatures.

J. W. CONVERSE, [L. S.]
GEORGE EVERETT, [L. S.]
MATTHEW BOLLES, [L. S.]

SUFFOLK, ss. BOSTON, AUGUST 4, 1870.

The within bond is approved.

GEORGE W. NICHOLS,
Assistant Clerk of Supreme Judicial Court.

BOND OF THOMAS W. PIERCE.

SUPREME JUDICAL COURT, SUFFOLK, ss.
Filed August 4, 1870.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

KNOW ALL MEN BY THESE PRESENTS, That we, Thomas W. Pierce of Boston in the County of Suffolk as principal, and Oakes Ames of North Easton Bristol County State of Massachusetts, and Peter Butler of Boston State of Massachusetts as sureties, are holden and stand firmly bound and obliged unto George C. Wilde of said Boston, Clerk of the Supreme Judicial Court of Massachusetts in and for the County of Suffolk in the full and just sum of twenty-five thousand dollars to be paid unto the said George C. Wilde, Clerk as aforesaid and his successors in said office or assigns ; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated the second day of August in the year of our Lord one thousand eight hundred and seventy.

The condition of this obligation is such that whereas in and by a decree of the Supreme Judicial Court of Massachusetts held at Boston

within and for the County of Suffolk, on the second day of August in the year 1870, made in the suit of George Ellis *et al.*, *vs.* The Boston, Hartford and Erie Railroad Company *et als.* pending in said court, James W. Converse, Otis Norcross, and said Thomas W. Pierce, all of said Boston, and George Talbot Olyphant of the City, County and State of New York, and George M. Bartholomew of Hartford in the State of Connecticut, were appointed receivers of all and singular the property of the Boston, Hartford and Erie Railroad Company with the powers and authorities and duties in said decree set forth; and whereas in and by said decree it is ordered that each of said receivers within twenty days from said date of said decree give his several bonds in the penal sum of twenty-five thousand dollars to the Clerk of said Court as obligee and his successors in said office with two sureties to the satisfaction of said Clerk or the Assistant Clerk of said Court, said bond to be for the benefit of all persons concerned and to be conditioned for the faithful performance by such receiver of his duties as such—

Now, therefore, if the above bounden Thomas W. Pierce shall well and faithfully perform each and all his duties as receiver as aforesaid then this obligation shall be void, otherwise shall remain in full force and effect.

Witness,
JAS. G. HARRIS.
F. A. FOGG.

T. W. PIERCE, [L S.]
OAKES AMES, [L. S.]
PETER BUTLER, [L. S.]

SUFFOLK, ss., BOSTON, AUGUST 4, 1870.

The above bond is approved.

GEORGE W. NICHOLS,
Asst. Clerk of the Supreme Judicial Court.

BOND OF GEORGE M. BARTHOLOMEW.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed August 4, 1870.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

KNOW ALL MEN BY THESE PRESENTS, That, we, George M. Bartholomew of Hartford in the State of Connecticut as principal, and M. C. Munson of Shirley, and Henry Edgarton of said Shirley, both in the Commonwealth of Massachusetts, as sureties, are holden and stand

firmly bound and obliged unto George C. Wilde of said Boston, Clerk of the Supreme Judicial Court of Massachusetts in and for the County of Suffolk, in the full and just sum of twenty-five thousand dollars to be paid unto the said George C. Wilde, clerk as aforesaid, and his successors in said office or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated the second day of August, in the year of our Lord, one thousand eight hundred and seventy.

The condition of this obligation is such, that whereas, in and by a decree of the Supreme Judicial Court of Massachusetts, held at Boston within and for the county of Suffolk, on this second day of August, made in the suit of George Ellis *et al.*, *vs.* The Boston, Hartford and Erie Railroad Company, *et als.* pending in said court, James W. Converse, Otis Norcross, and Thomas W. Pierce, all of said Boston, and George Talbot Olyphant of the City, County and State of New York, and said George M. Bartholomew of Hartford, in the State of Connecticut, were appointed receivers of all and singular the property of the Boston, Hartford and Erie Railroad Company, with the powers, authorities and duties in said decree set forth; and whereas in and by said decree it is ordered that each of said receivers within twenty days from said date of said decree give his several bond in the penal sum of twenty-five thousand dollars to the Clerk of said Court as obligee, and his successors in said office with two sureties to the satisfaction of said clerk or the assistant clerk of said court, said bond to be for the benefit of all persons concerned, and to be conditioned for the faithful performance by such receiver of his duties as such.

Now, therefore, if the above bounden George M. Bartholomew shall well and faithfully perform each and all his duties as receiver as aforesaid, then this obligation shall be void, otherwise of full force and effect.

In presence of
HENRY LUNT, to G. M. B.
GEORGE R. FOWLER, to A. C. M. & H. E.

GEORGE M. BARTHOLOMEW, [L. S.]
A. C. MUNSON, [L S.]
HENRY EDGERTON, [L. S.]

SUFFOLK, ss., BOSTON, AUGUST 4, 1870.

The within bond is approved.

GEORGE W. NICHOLS,
Asst. Clerk of the Supreme Judicial Court.

DECREE AUTHORIZING MAJORITY OF RECEIVERS TO BORROW MONEY TO PRESERVE N. & W. LEASE.

SUPREME JUDICAL COURT,
AT CHAMBERS IN BOSTON. August 4, A. D. 1870.

GEORGE ELLIS ET AL. *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS., IN EQUITY,

It being made to appear to the Court that Otis Norcross and George Talbot Olyphant, appointed as receivers in said case, in and by the decree of this Court, made on the second day of August, current, are now without the Commonwealth of Massachusetts, and have not been qualified as yet to act as such receivers, and it also appearing that James W. Converse, Thomas W. Pierce, and George M. Bartholomew have been qualified to act as such receivers, and it also appearing that immediate action should be taken by said receivers in borrowing money for the purpose of preserving the rights of said Boston, Hartford and Erie Railroad Company, under the indenture of lease made between the Norwich and Worcester Railroad Company, and said Boston, Hartford and Erie Railroad Company, dated on the ninth day of February, A. D. 1869, a copy of which is annexed to the bill of complaint in said case:

Now it is hereby ordered and decreed by the court, that said Converse, Pierce and Bartholomew shall have the power, without the concurrence of the other two receivers, to borrow money for the purpose aforesaid, and to secure the payment of the same, as provided in said decree.

HORACE GRAY, JR., *Justice.*

On the foregoing is the following endorsement.

We hereby assent to the within decree:

J. G. ABBOTT, *Att'y for Bos. Hart. and Erie R. R. Co.*
J. P. HEALEY, *Att'y for Messrs. Talbot & Kimball.*
H. W. PAINE, *Att'y for J. S. Eldridge.*
BROOKS & BALL, *Attorneys for Receivers.*

DECREE AUTHORIZING MAJORITY OF RECEIVERS TO ACT IN CERTAIN CASES.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
August 6, 1870.

GEORGE ELLIS ET AL., IN EQUITY, *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

And now, on this sixth day of August, A. D. 1870, it being made to appear to the Court, that on account of the large number of receivers

appointed by the Court in its decree in this cause, dated August second, A. D. 1870, and on account of the residence of some of them in other States, it wil be impracticable for them to perform their duties as receivers, without delays, inconvenient and injurious to the interests of said trust, if they are all required to act in matters of detail in executing said trust: It is therefore ordered, adjudged and decreed, that a majority of said receivers shall have power to take possession of all the property, books, leases, documents, vouchers and other papers of said corporation, make the requisite inventory thereof, and to take care of, preserve and manage said property, and operate said railroad, and to this extent administer said trust; and such acts of such majority shall have the same force and effect as if done by all said receivers.

HORACE GRAY, JR., *Justice.*

Filed with the preceding is a copy of the same on which are the following indorsements:—

The within decree is assented to.

BROOKS & BALL,
Attorneys for Complainants.

The above decree is agreed to.

J. G. ABBOTT,
Att'y for the Bos., H. & E. R. R. Co.
H. W. PAINE, for
J. S. ELDRIDGE.
J. P. HEALY, for THOS. TALBOT, and MOSES KIMBALL, *Trs.*

August 6, 1870. Let this draft be filed with this decree.

H. G., JR.

BOND OF GEORGE TALBOT OLYPHANT.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed August 8, 1870.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

KNOW ALL MEN BY THESE PRESENTS, That, we, George Talbot Olyphant of the city, county and State of New York as principal, and Elisha S. Converse of Malden, and James W. Converse of Boston, both in Massachusetts, as sureties, are holden and stand firmly bound and obliged unto George C. Wilde of Boston, in the county of Suffolk and Commonwealth of Massachusetts, Clerk of the Supreme Judicial Court of Massachusetts, in and for the said county of Suffolk, in the full and just sum of twenty-five thousand dollars to be paid unto the

said George C. Wilde, clerk as aforesaid, and his successors in said office or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated the second day of August, in the year of our Lord one thousand eight hundred and seventy.

The condition of this obligation is such that whereas in and by a decree of the Supreme Judicial Court of Massachusetts, held at said Boston, within and for said county of Suffolk on the second day of August, made in the suit of George Ellis *et al. vs.* the Boston, Hartford and Erie Railroad Company *et als.* pending in said court, James W. Converse, Otis Norcross, and Thomas W. Pierce, all of said Boston, said George Talbot Olyphant, and George M. Bartholomew of Hartford, in the State of Connecticut, were appointed receivers of all and singular the property of the Boston, Hartford and Erie Railroad Company, with the powers and authorities, and duties in said decree set forth, and whereas in and by said decree it is ordered that each of said receivers within twenty days from said date of said decree give his several bond in the penal sum of twenty-five thousand dollars to the clerk of said Court as obligee, and his successors in said office with two sureties to the satisfaction of said clerk or the assistant clerk of said court, said bond to be for the benefit of all persons concerned, and to be conditioned for the faithful performance by such receiver of his duties as such.

Now, therefore, if the above bounden George Talbot Olyphant shall well and faithfully perform each and all his duties as receiver as aforesaid, then this obligation shall be void, otherwise shall remain in full force and effect.

In presence of

THO. E. CLAVE (?)
BENJ. F. BROOKS.

GEORGE TALBOT OLYPHANT, [L. S.]
ELISHA S. CONVERSE, [L. S.]
J. W. CONVERSE, [L. S.]

SUFFOLK, ss. BOSTON, August 8, 1870.

The within bond is approved.

GEORGE W. NICHOLS,
Asst. Clerk of Supreme Judicial Court,
Suffolk County.

PETITION THAT J. GRAHAME GARDINER BE APPOINTED A RECEIVER IN PLACE OF OTIS NORCROSS.

SUPREME JUDICIAL COURT, SUFFOLK, *ss.*
Filed September 26, 1870.

To the Honorable the Justices of the Supreme Judicial Court in and for the County of Suffolk:

Respectfully represent unto your Honors, George Ellis, Matthew Bolles, and Michael S. Bolles, the plaintiffs in said case, that Otis Norcross, who was appointed one of the receivers of all the property, funds, and effects of the said Boston, Hartford and Erie Railroad Company, in and by the decree of said Court, made on the fourth day of August, in the year eighteen hundred and seventy, has neglected to accept said trust, and there is now a vacancy in said receivership to be filled by said Court.

Wherefore said plaintiffs pray that said decree may be amended by striking out of the same the name of said Otis Norcross, and inserting therein, in its place and stead, the name of J. Grahame Gardiner of New York City, as receiver, conjointly with said James W. Converse, George Talbot Olyphant, Thomas W. Peirce, and George M. Bartholomew, of all the property, funds and effects of said Corporation with the same powers and duties, and subject to the same provisions and restrictions as if he, the said Gardiner, had been appointed receiver in and by said decree.

GEORGE ELLIS.
MATTHEW BOLLES.
MICHAEL S. BOLLES.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

I, Nathaniel A. Prentiss, a Commissioner for the Commonwealth of Massachusetts, residing at New York, in the County and State of New York, do certify, that on the twenty-fourth day of September, in the year eighteen hundred and seventy, the above named George Ellis one of the parties named in said petition, personally appeared before me at New York, aforesaid, and subscribed the foregoing petition in my presence, and did depose and swear that the matters therein contained were true.

In witness whereof, I have hereto set my hand and affixed my official seal, this 24th day of September, A. D., 1870, at New York aforesaid.

{ Com'r Seal }

NATH. A. PRENTISS,
Commissioner for Massachusetts.

DECREE APPOINTING J. GRAHAME GARDINER RECEIVER.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, *ss.*
April term, 1870.

GEORGE ELLIS ET AL., *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD ET ALS.

And now on petition of George Ellis and others, plaintiffs in the above suit, it appearing to the Court that there is a vacancy in the Board of Receivers, appointed by this Court in the above case, Otis Norcross having declined to serve, it is ordered, adjudged and decreed, that the original decree appointing receivers in this cause be amended by striking out the name of Otis Norcross and inserting that of J. Grahame Gardiner, and that he be allowed ten days from the date of this decree in which to qualify and furnish bonds as ordered in original decree, and that said Gardiner have the same powers and duties, and be subject to the same restrictions and liabilities as if he had been originally appointed receiver.

By the Court.

GEORGE C. WILDE, *Clerk.*

September 26, 1870.

PETITION OF ADAMS EXPRESS COMPANY.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
Filed September 30, 1870.

GEORGE ELLIS, ET AL., *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

To the Supreme Judicial Court:

The petition of the Adams Express Company, a joint stock association, organized under the laws of the State of New York, and having its principal office and place of business in the city of New York, respectfully represents:

I. Your petitioners are engaged in the general express and forwarding business, between the cities of Boston and New York, and have been so engaged during all the times mentioned herein.

II. On the first day of April, 1869, a contract was made and entered into in duplicate, by and between your petitioners of the one part, and the Boston, Hartford and Erie Railroad Company of the other part, the originals of which said contract were respectively interchanged between the parties thereto, and a copy of which said contract is hereto annexed, and is made part hereof.

III. The said Adams Express Company has faithfully fulfilled all the stipulations and conditions of said contract on its part to be performed, and did advance the two hundred thousand dollars to the said railroad company in the said agreement mentioned, at the times therein specified.

IV. That there remained due upon the two hundred thousand dollars, so advanced by the said express company to the said railroad company, on the first day of August, 1870, on the principal of said advance one hundred and four thousand seven hundred and sixty-two $\frac{28}{100}$ dollars, and for interest twelve thousand five hundred and eighty-two $\frac{83}{100}$ dollars. The aggregate of said two last named sums has been reduced by the moneys accruing under said contract, to the said railroad company, during the month of August, of which no specific statement has yet been made, but which amounts will not exceed the sum of eight thousand dollars.

V. That the stock mentioned in said agreement as collateral for said advance, is not worth in the market, at this time, over fifty thousand dollars, leaving a balance of over fifty-eight thousand dollars yet due for said advance to the said express company.

VI. The said railroad is a necessary means of express communication for the said express company, between the said cities of Boston and New York, and is necessary for the accommodation to the public who patronize the said express company.

VII. The stipulations contained in the said contract, were and are reasonable, and the amount of freight money therein agreed to be paid will, upon the basis of the amount carried, and the computation of freight thereon per cubic foot or per pound, make a larger sum by way of freight money than the said express company is in the habit of paying other railway companies who transport for such express company by pound or by cubic foot.

VIII. As your petitioners are informed and believe, by a decree of this court, made in this suit on the second day of August, 1870, James W. Converse, Otis Norcross, Thomas W. Pierce, George Talbot Olyphant and George W. Bartholomew were appointed receivers of the said railroad, and by some subsequent proceeding one Gardiner was added to the number of such receivers, and said receivers were directed to maintain, keep in repair and operate, and carry on the said railroad, and to take possession of all and singular the contracts made by said railroad company with other parties including, as your petitioners are informed and believe the contract herein before referred to, a copy of which is hereto annexed, and said duplicate original, as your petitioners believe, is now in the hands of the said receivers.

IX. That the said receivers, or one of them, have or has caused a notification to be given to your petitioners, that the said receivers do not regard the said contract as longer in existence, or as binding upon the said receivers, and they have also notified your petitioners that they would terminate the same on the first day of October next ensuing.

Such notification was received by your petitioners, at their New York office, on the twenty-eight of September, and was in the form of a letter in the words and figures following, to wit :—

RECEIVERS' OFFICE, B. H. & E. R. R.,
84 Water St., Boston, Sept. 27, 1870.

HENRY SANFORD, ESQ., *Adams Express Co., New York:*

DEAR SIR,—At a meeting of the board of receivers held yesterday at this place, by vote of the board the chairman was authorized and requested to notify the Adams Express Company that on and after the first day of October the receivers will decline to furnish transportation at the present rates of compensation.

By another vote of the board the chairman is authorized to conclude arrangements for express service, and if your company desires to cover the line an early interview is desirable. If you on the contrary propose to abandon it, a message to that effect by telegraph will facilitate operations.

Very respectfully,
T. W. PIERCE, *Chairman.*

That on the receipt of such letter your petitioners caused to be sent to the said T. W. Pierce a telegram in the words and figures following :—

NEW YORK, Sept. 27, 1870.

T. W. PIERCE, 84 *Water St., Boston, Mass* :

Yours of the 27th received. We wish to continue the express business over your line. Engagements prevent my seeing you this week. Please defer any action until Monday or Tuesday of next week, when I will meet you in Boston.

HENRY SANFORD, *A. O.*

To which the said T. W. Pierce answered in the words following :—

Despatch received. The order of the board is imperative and action cannot be postponed.

T. W. PIERCE, *Chairman.*

X. And your petitioners believe and charge the fact to be that it is

the intention of the said receivers to disregard the said contract, and to refuse on the first day of October to receive and transport express freight thereunder for your petitioners. And your petitioners are advised and believe that the said receivers have no right to disregard the said contract and as a matter of law the same is binding upon them as upon the said railroad company, and that it is within the power of the said court—the said receivers being officers of this court—to control their action in the premises and to require them to fulfil, observe and perform all the stipulations, agreements, obligations and requirements in said contract contained.

XI. Prior to the letter of the said Pierce herein before set forth, conferences with reference to the subject-matter of the said contract, and of its continuance had been had between the said receivers, or one of them and your petitioners, and various letters had passed between the parties. One of said letters was in the words and figures following :—

84 Water St., Boston, 24th August, 1870.

H. Sanford, Esq., *Adams Express Co., New York.*

Dear Sir,—We have taken counsel of our attorney in relation to your contract with the Boston, Hartford and Erie Railroad, and are advised by them that we as receivers are not obligated to transport your freight or express matter under that contract.

Unless some satisfactory arrangement can be made before August 31st, we shall not after that date transport any of your freight or express matter. We shall be glad to see you upon the subject last named at any time you may appoint and trust that we may arrive at a satisfactory arrangement for the continuance of your business.

For the receivers of the B. H. & E. R. R

T. W. Pierce, *Chairman.*

Subsequently an agreement was made between the said receivers, as your petitioners understood, the same to the effect that the question whether such contract continued after the appointment of receivers, and enured to the benefit of your petitioners, while the said railroad was in the hands of the receivers as officers of the court, should be left to this court for judicial decision, and your petitioners have always been ready and willing so to leave the same ; and in answer to the said letter of the 24th of August last, before recited, and in pursuance of a desire to continue the express business over the said railroad, and to procure a judicial decision of the rights of the parties herein, your petitioners caused to be written and sent to the said T. W. Pierce a letter, in the words and figures following to wit :—

NEW YORK, Sept. 10, 1870.

T. W. PIERCE, ESQ., *Receiver, B. H. & E. R. R. Co., Boston, Mass:*

DEAR SIR,—In accordance with our verbal provisional agreement made the 31st of August last, the Adams Express Company hereby agrees to pay in cash for express service during the current month of September, in accordance with the terms of the contract now existing with the Boston, Hartford and Erie Railroad Company, payment to be made as early in the month of October as the amount due for such service can be ascertained from the accounts, unless the court decides that the said existing contract is valid and binding upon the receivers, the same as it would have been on the Boston, Hartford and Erie Railroad Company in case no receiver had ever been appointed, and that therefore the Adams Express Company is entitled to have the earnings for express service applied as the aforesaid contract, provides—the foregoing to be considered provisional only.

THE ADAMS EXPRESS COMPANY,
By HENRY SANFORD, *General Superintendent.*

REFERENCE TO MASTER TO EXAMINE ACCOUNTS OF RECEIVERS ON RESIGNATION OF THOS. W. PIERCE.

AT CHAMBERS, IN BOSTON, DEC. 17, 1870.

Upon the application of Thomas W. Pierce, one of the receivers in this cause, to resign said office, it is ordered that Horace H. Coolidge, Esq., Master in Chancery, audit and examine the accounts of said receivers, and report to the court as to the correctness thereof, and also ascertain and report to the court what is a reasonable and proper compensation to be allowed to said Pierce for his services as such receiver.

By the order of Horace Gray, Jr., Esq., one of the Justices of said court.

GEO. C. WILDE, *Clerk.*

COPY. ATTEST: GEO. C. WILDE, *Clerk.*

MASTER'S REPORT.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
Filed Feb. 10, 1871.

GEORGE ELLIS ET ALS *v.* THE BOSTON, HARTFORD AND ERIE RAILROAD CO. ET ALS.

Pursuant to an order of Court in the above named action the undersigned, a Master in Chancery, has audited and examined the accounts

of the Receivers of above named corporation for the months of August, September, October and November in the year 1870, copies whereof are annexed to this report and finds the same to correspond in every particular with the books kept by said Receivers and he believes said books have been correctly kept, he has also carefully examined the vouchers held by said Receivers and finds that each and every payment which appears in said account is fully and properly vouched for.

Said Master further reports to the Court that the sum of three thousand dollars ($3000) is a reasonable and proper compensation to be allowed Thomas W. Pierce for his services as one of said Receivers.

H. H. COOLIDGE,
Master in Chancery.

[Copies of Receivers accounts for August, September, October and November, 1870, annexed.]

ANSWER OF THOMAS TALBOT AND MOSES KIMBALL, TWO OF THE RESPONDENTS IN THE ABOVE NAMED BILL OF COMPLAINT.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed Feb. 11, 1871.

GEORGE ELLIS & ORS., COMPLAINANTS., *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY & ORS., RESPONDENTS.

These Respondents now and at all times having and reserving unto themselves all objections which can or may be taken to the many errors, uncertainties and other imperfections in the Orators' bill of complaint contained, for answer unto or to so much and such parts thereof as these Respondents are advised are material for them to answer unto, answering, say:

That they admit that the Boston, Hartford and Erie Railroad Company made bonds to the amount of twenty million dollars and secured the payment thereof by a mortgage on their franchise and other property running to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, as Trustees, and issued the said bonds, substantially as set forth in the said Bill of Complaint; and that said Boston, Hartford and Erie Railroad Company have failed to pay the interest due on said bonds as the said bill alleges.

And these Respondents allege that after the making, execution and delivery of the said mortgage, namely, on or about the 27th day of February, A. D. 1867, the said Berdell by an instrument in writing, a copy

whereof makes a part of the exhibit hereto annexed, marked A, which these Respondents crave leave to refer to as a part of this answer, resigned his place and duties as one of said Trustees under said mortgage, and thereafterwards, to wit, on or about the 28th day of October A. D. 1867, the remaining Trustees, the said Gregory and Davis by an instrument in writing, and under seal, a copy whereof makes a part of said exhibit, marked A, appointed John S. Eldridge to be a Trustee under said mortgage in place of the said Berdell, who had resigned, and conveyed to said Eldridge all the powers and rights, and imposed upon him all the duties, which formerly had belonged to the said Berdell; and thereafterwards, to wit, on or about the first day of December, A. D. 1868, the said Gregory and Davis by an instrument under their hands and seals, a copy whereof makes part of the exhibit hereto annexed, marked B, which these Respondents crave leave to refer to as a part of this answer, resigned their places and duties as Trustees under said mortgage, and the said Eldridge, then the only remaining Trustee under said mortgage, on or about the 16th day of August, A. D. 1869, by an instrument under his hand and seal, a copy whereof makes a part of the said exhibit marked B, appointed Mark Healey and Henry N. Farwell to be Trustees under said mortgage in places of the said Gregory and Davis, who had resigned, and invested them with all the rights and duties which belonged to the said Gregory and Davis before their said resignation; and thereafterwards, to wit, on or about the 16th day of March, A. D. 1870, the said Healey and Farwell, by an instrument under their hands and seals, a copy whereof makes a part of exhibit hereto annexed, marked C, to which these Respondents crave leave to refer as part of this answer, resigned their places and duties under the said mortgage; and thereafterwards, to wit, on or about the said 16th day of March, A. D. 1870, the said Eldridge, then the only remaining Trustee under said mortgage, by an instrument under his hand and seal, a copy whereof forms part of said exhibit marked C, appointed these Respondents, the said Talbot and Kimball, to be Trustees under said mortgage, and invested them with all the powers and duties which belonged to the said Healey and Farwell before their said resignation; and thereafterwards, to wit, on or about the said 16th day of March, A. D. 1870, the said Eldridge by an instrument under his hand and seal, a copy whereof is hereto annexed, marked D, and to which these Respondents crave leave to refer as a part of this answer, resigned his place and duties under said mortgage; and thereafterwards, to wit, on or or about the fifth day of July, A. D. 1870, the said Talbot and Kimball, then the only remaining Trustees under said mortgage, by an instrument under their hands and seals, a copy whereof is hereto annexed, marked E, to which these

Respondents crave leave to refer as part of this answer, appointed Avery Plumer to be a Trustee under said mortgage in place of the said Eldridge, who had resigned, and invested the said Plumer with all the powers and duties which belonged to the said Eldridge before his said resignation; and all said persons so as aforesaid appointed Trustees under said mortgage, severally accepted the trusts and duties imposed on them successively by their respective appointments as aforesaid, as will appear by the aforesaid exhibits, copies of which are hereto annexed.

And these Respondents allege that all said appointments to and resignations of the Trusteeship under said mortgage, were in due form and legal in their character, and that all the powers and duties belonging to the said Trusteeship were regularly and legally transmitted from the original Trustees, the said Berdell, Gregory and Davis, through the said several appointments aforesaid to these Respondents and the said Plumer, and that these Respondents and the said Plumer are now the legally constituted Trustees under said mortgage, and have all the rights and powers, and are subject to all the duties and obligations, which originally belonged or appertained to the said Berdell, Gregory and Davis as Trustees under said mortgage, and as such Trustees these Respondents and the said Plumer are entitled to have and ought to be in possession of all the mortgaged premises aforesaid, that they might manage and dispose of the same in accordance with the provisions of the said mortgage for the benefit of the holders of the bonds aforesaid.

And these Respondents admit that certain of the aforesaid bonds were by the provisions of said mortgage to be retained and used by the trustees under said mortgages, to the amount and for the purposes set forth in the said bill; but these Respondents deny that any or either of said bonds came into their possession, or that they, or either of them, have had any participation in or knowledge of the disposition [of] said bonds, or that they are in any way in default on account thereof.

And these Respondents deny that they have any connection with any Railroad Company, which gives them any interest antagonistic to the said Boston, Hartford & Erie Railroad, or that they have any wish or purpose unfriendly to it, or any desire in the premises other than faithfully to execute the trust they have assumed under the said mortgage. This Respondent, Moses Kimball, is a Director in the Boston & Albany Railroad Company, appointed by the Legislature of the Commonwealth of Massachusetts, for the protection of the Commonwealth's interest therein, and this Respondent, Thomas Talbot, holds no office connected with said Boston & Albany Railroad Com-

pany; and neither of these Respondents holds any office in connection with said Boston & Albany Railroad Company other than as aforesaid.

As to the various allegations in the said bill of complaint, other than those hereinbefore admitted or denied, these Respondents have no knowledge upon which they can admit or deny them, or either of them; and they leave the Complainants to prove each and every of them.

And these Respondents deny that any other matter or thing in said bill of complaint contained and not herein and hereby well and sufficiently answered, confessed, traversed or avoided or denied is true all of which matters and things herein contained these Respondents are ready to aver, prove and maintain as this honorable Court shall direct and they pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained and the mortgaged premises aforesaid may be decreed to be delivered to them and the said Plumer to be held, used, managed and disposed of according to the provisions of said mortgage and that they may have such other orders and decrees in the premises as justice and good conscience may require and to this honorable Court shall seem meet.

THOMAS TALBOT,
MOSES KIMBALL.

JOHN P. HEALY,
Solicitor.

PETITION OF COMMONWEALTH'S COUNSEL TO APPEAR.

SUPREME JUDICIAL COURT, SUFFOLK, SS., IN EQUITY.
Filed February 25, 1871.

GEORGE ELLIS AND OTHERS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS.

And now, Edward L. Pierce, Counsellor, having been appointed by the Governor of the Commonwealth of Massachusetts under the Resolve of the General Court approved February 7, 1871, as attorney to maintain and enforce the rights and interests of the Commonwealth in and under the bonds of the Boston, Hartford and Erie Railroad Company secured by the mortgage made by Robert H. Berdell and others referred to and the pleadings in this cause, asks leave to appear for that purpose therein and to attend the hearings of this court upon the same.

EDWARD L. PIERCE,
of Counsel for the Commonwealth.

BILL TAKEN PRO CONFESSO *vs.* ELDRIDGE.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, SS., IN EQUITY.

GEORGE ELLIS AND OTHERS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS.

And now, on this twenty-fifth day of February, A. D. 1871, it appearing to the Court that John S. Eldridge one of the defendants in this cause has been duly served with process and has appeared therein, that the time for filing his answer to the bill of Complaint has long elapsed and that no answer has been filed on his behalf in said cause, on motion of Brooks and Ball, Solicitors for Complainants, It is ordered that the bill of Complaint as against the said defendant John S. Eldridge be taken as confessed.

By the order of Horace Gray, Jr., Esq., one of the Justices of said court.

GEORGE C. WILDE, *Clerk.*

RETURN OF SERVICE ON BERDELL, GREGORY AND DAVIS.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
Filed January 6, 1871.

GEORGE ELLIS ET ALS. IN EQUITY *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY ET ALS.

And now it appearing in the above entitled cause that Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, three of the defendants named in the bill of complaint in said cause, a copy of which bill of complaint is hereto annexed, reside out of the Commonwealth of Massachusetts, to wit, the said Berdell at Goshen, in the State of New York, the said Gregory at Jersey City, in the State of New Jersey, and the said Davis at Washington, in the District of Columbia, it is on this seventeenth day of December, A. D. eighteen hundred and seventy, on the application of the Plaintiffs, ordered that said Berdell, Gregory and Davis appear and answer the plaintiffs' said bill of complaint within one month from the first Monday of January next, and they are required to appear and answer the same accordingly, and it is further ordered that a copy of this order including a copy of said bill of complaint be served on each of them the said Berdell,

Gregory and Davis personally or be published three times in different weeks within thirty days after the date of this order, in the Boston Post, a newspaper published at Boston in said County of Suffolk.

GEO. C. WILDE, *Clerk.*

A true copy.

Attest:

GEO. C. WILDE, *Clerk.*

[Then follows a copy of the Bill filed in this cause July 20, 1870.]

ORDER OF NOTICE ON ABSENT DEFENDANTS.

SUPREME JUDICIAL COURT, SUFFOLK, SS.

GEORGE ELLIS ET ALS IN EQUITY *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY ET ALS.

And now it appearing in the above entitled cause that Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, three of the defendants named in the bill of complaint in said cause, a copy of which bill of complaint is hereto annexed, reside out of the Commonwealth of Massachusetts, to wit, the said Berdell at Goshen, in the State of New York, the said Gregory at Jersey City, in the State of New Jersey, and the said Davis at Washington, in the District of Columbia, it is on this seventeenth day of December, A. D. eighteen hundred and seventy, on the application of the Plaintiffs, ordered that said Berdell, Gregory and Davis appear and answer the plaintiffs' said bill of complaint within one month from the first Monday of January next, and they are required to appear and answer the same accordingly, and it is further ordered that a copy of this order including a copy of said bill of complaint be served on each of them the said Berdell, Gregory and Davis personally or be published three times in different weeks within thirty days after the date of this order in the Boston Post, a newspaper published at Boston in said County of Suffolk.

GEO. C. WILDE, *Clerk.*

[Copy of bill annexed.]

I, George L. Haight, of the city of New York, on oath depose and say that I delivered in hand to Robert H. Berdell and Dudley S. Gregory mentioned in the foregoing attested copy of an order made in the case of George Ellis and others against the Boston, Hartford and Erie Railroad Company and others, a true and attested copy of all the foregoing papers, being a true and attested copy of said order and of the

copy of the bill of complaint thereto annexed. Said copies were delivered by me to said Berdell in hand on twenty-sixth day of December, A. D. eighteen hundred and seventy, and to Gregory in hand on the twenty-seventh day of said December.

G. L. HAIGHT.

CITY, COUNTY AND STATE OF NEW YORK.

DECEMBER 28, A. D. 1870.

Then the said George L. Haight personally appeared before me and made oath that the foregoing affidavit by him subscribed, and the statements therein contained are true.

Witness my hand and seal the day and year last aforesaid.

[L. S.] PIERCE W. WILDER,
Notary Public.

I, A. L. Wallar, of Washington City, in the District of Columbia, on oath depose and say that on this third day of January, A. D. eighteen hundred and seventy-one, I delivered in hand to John C. Bancroft Davis mentioned in the foregoing attested copy, a true and attested copy of all the foregoing papers except of the affidavit of George L. Haight and of the Notary's certificate thereto attached.

A. L. WALLAR.

DISTRICT OF COLUMBIA,
WASHINGTON CITY, SS.

JANUARY 3, A. D. 1871.

Then personally appeared the above named A. L. Wallar, before me and made oath that the foregoing affidavit by him subscribed and the statements therein contained are true.

Witness my hand and official seal the day and year last aforesaid.

[L. S.] CHAS. McNAMEE, *Notary Public.* } *Notary Public in and for the District of Columbia.*

PETITION TO AMEND BILL.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
Filed March 1, 1871.

GEORGE ELLIS AND OTHERS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS. AT CHAMBERS, MARCH, 1871.

To the Honorable the Justices of the Supreme Judicial Court.

Respectfully represent the undersigned, the Complainants in the above entitled cause, that they are informed by the Answer to the bill

of complaint filed by Thomas Talbot and Moses Kimball two of the defendants herein, that one Avery Plumer of Boston claims to be trustee in place of John S. Eldridge in the trust set forth in said bill, and to have been appointed as such trustee, and they pray that they may be allowed to amend their bill so as to make said Plumer a party defendant thereto.

GEORGE ELLIS,
MATTHEW BOLLES,
MICHAEL S. BOLLES,
BROOKS & BALL,
their Solicitors,
J. C. AYER, by W. G. RUSSELL,
his Solicitor.

SUPREME JUDICIAL COURT.

SUFFOLK, ss. IN EQUITY.

AT CHAMBERS IN BOSTON, March 1, 1871.

On the foregoing petition, it is ordered and decreed that the said Avery Plumer be made a party defendant in said suit.

By the order of Horace Gray, Jr., Esq., one of the Justices of said Court.

GEORGE C. WILDE, *Clerk.*

AMENDMENT OF BILL.

SUPREME JUDICIAL COURT.
March 1, 1871.

GEORGE ELLIS ET AL., IN EQUITY, *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

And now upon the filing of the petition of the complainants in the above entitled cause, stating that they have been informed by the answer of the defendants, Thomas Talbot and Moses Kimball, to the Bill of Complaint herein, that Avery Plumer of said Boston claims to be trustee in the place of said Eldridge, and to have been appointed as such, and the Court having ordered the said Plumer to be made a party defendant to said Bill, the complainants come and amend their said bill as follows, to wit: by inserting the words "but that they have been informed that Avery Plumer of said Boston claims to be trustee in the place of said Eldridge, and to have been appointed as such,"

after the words, "have no knowledge," and before the words, "that said Berdell," on the sixth line of the eleventh page of said bill, and by inserting the word "Plumer," after the word "Talbot," on the twenty-first line of the twenty-fifth page, also the same word after the word "Talbot" in the sixteenth line of the twenty-sixth page, and after the word "Talbot" in the second line of the twenty-seventh page of said bill.

BROOKS & BALL,
Solicitors for Complainants.

AT CHAMBERS IN BOSTON, March 1, 1871.

And now it is ordered and decreed that the above amendment be and the same is hereby allowed.

By the order of Horace Gray, Jr., Esq., one of the Justices of said Court.

GEO. C. WILDE, *Clerk.*

STATEMENT OF J. H. LOUD, TREASURER, AS TO BONDS HELD BY THE COMMONWEALTH.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
Filed Dec. 16, 1870.

The amount of the bonds of the Boston, Hartford & Erie Railroad Company now held by the Commonwealth of Massachusetts is correctly stated in the annexed report made by me to the Honorable Senate on May 31, 1870 (Senate Doc. 287), which describes the same fully.

No part of the principal or interest of the same has since been paid.

On July 1, 1870, interest to the amount of £15,500 fell due upon the bonds issued by the Commonwealth to said Company under Sts. 1867, c. 284, and 1869, c. 450, which by the terms of said acts it was incumbent upon the said Company to pay. The said Company failed to pay said interest and the same was paid by the Commonwealth at a cost of $86,048.67 in currency; viz,

Paid June 10, 1870, for	£10,000 exch.	$55,666 67
Paid June 21, 1870, for	5,500 exch.	32,382.00
	£15,500	$88,048.67

The said Company has been duly requested to repay said sum so paid for interest, but up to this time has failed and neglected to pay the same and has paid no part thereof. I am informed that no provision has been made by said Company or in its behalf for the payment of the interest falling due January 1st next as said bonds issued by the Commonwealth to the said Company, and I have purchased on behalf of the Commonwealth £19,000 of exchange at a cost in currency of $102,509.99, and have transmitted the same to Messrs. Baring Bros. & Co. of London, for the purpose of paying the same.

JACOB H. LOUD,
Treasurer of Massachusetts.

SUFFOLK, ss. Dec. 16, 1870.

Subscribed and sworn to before me.

JAMES C. DAVIS.
Justice of the Peace.

SENATE . . . . . No. 287.

COMMONWEALTH OF MASSACHUSETTS.

IN SENATE, May 31, 1870.

To the Hon. HORACE H. COOLIDGE, *President of the Senate:*

SIR:—In compliance with a joint Order of the 24th instant, of which a copy is annexed, I submit for the information of the legislature, statements of the several points contained in said Order, so far as the information sought is within the knowledge of this department.

The amount of Berdell mortgage bonds held by the Commonwealth as security for scrip issued to the Boston, Hartford and Erie Railroad Company is $3,600,000.

The dates at which they were received were as follows:—

1868, December 24th,	1,000 bonds	$1,000 each,	$1,000,000 00
1869, March 12th,	100 "	1,000 each,	100,000 00
31st,	100 "	1,000 each,	100,000 00
	1,200 bonds	$1,000 each,	$1,200,000 00

The above were received under the provisions of chapter 284 of the Acts of 1867, and there was issued to said company Massachusetts sterling 5 per cent. bonds to the amount of £160,000, which, reduced to dollars at $4 84, is $774,400.

Under the Act of June 22, 1869, being chapter 450 of the Acts of that year, Berdell mortgage bonds were received at the following dates:—

1869, July 27th,	300	bonds at $1,000 each	$300,000 00
Aug. 5th,	300	" "	300,000 00
Aug. 13th,	200	" "	200,000 00
Aug. 27th,	300	" "	300,000 00
Sept. 1st,	100	" "	100,000 00
Sept. 15th,	200	" "	200,000 00
Sept. 16th,	100	" "	100,000 00
Oct. 19th,	200	" "	200,000 00
Oct. 21st,	300	" "	300,000 00
Dec. 24th,	200	" "	200,000 00
1870, Jan. 5th,	100	" "	100,000 00
Jan. 6th,	100	" "	100,000 00
	2,400	bonds at $1,000 each	$2,400,000 00

There was issued to said company in State scrip the further sum of £583,600, reduced to currency at $4.84, $2,824,624, making the whole issue, at $4.84, $3,599,024.

The first Act required the company to deposit with the State treasurer $133,333.33 of Berdell mortgage bonds for every $100,000 of Massachusetts bonds received by them as security. In the second Act the policy of the State as to its security was entirely changed by requiring, instead of an excess of Berdell mortgage bonds of $33\frac{1}{3}$ per cent. over the State bonds issued, that the company should pay to the commissioners of the sinking fund established under the first Act such a sum as the governor and council should direct, but not less in amount than shall, with its accumulations, produce at the maturity of the scrip issued to said company by the State an amount equal to the scrip so issued. The last Act repealed the conditions for the issue of scrip under the first Act, so far as it related to the further issue of scrip. The legislature thus emphatically declared its preference for the greater security afforded by the payment at once into the sinking fund of an amount of money which with its accumulation at the time of the maturity of the scrip issued by the State would be sufficient for its redemption, holding in addition an equal amount of Berdell mortgage bonds to the amount of Massachusetts State bonds issued to the company. The governor and council fixed that sum at seventeen and $\frac{40}{100}$ dollars for every one hundred dollars of State scrip issued. It was thought wise and expedient to apply the same principle to the amount issued under the first Act, on the ground that it would afford the

Commonwealth the same proportionate additional security as under the last Act, and if not in strict conformity with the letter of the first Act, it was in accordance with the last expressed policy of the State. Upon the receipt from the company in cash of the required amount to be paid to the sinking fund, as fixed by the governor and council, the excess of Berdell bonds held under the first Act was allowed to be used toward an equal amount of State bonds to be issued. The wisdom of this policy is shown in the fact that the amount of money paid into the sinking fund by the company in lieu of the excess of Berdell bonds is $134,745, while the Berdell bonds thus released, amounting at par to $258,133.33⅓, can be replaced in the treasury, if the legislature should not approve the policy pursued, at the present price in the market, (32,) for $82,453.33, and leave a surplus of $52,292.27.

The interest on the Berdell bonds is payable in January and July in each year. The first $1,200,000 of these bonds had upon them interest coupons due July, 1869, and January, 1870, and for each succeeding six months until maturity. The July, 1869, and January, 1870, coupons, are overdue and unpaid. The earliest coupons on the remaining bonds will become due in July next.

The interest on the Massachusetts sterling five per cent. bonds issued to the Boston, Hartford & Erie Railroad Company commenced falling due in July, 1869. The coupons which fell due at that time and for the succeeding six months, January, 1870, were paid by that company and were all returned to this office cancelled, and are now on file.

And as to the remaining point, "whether the scrip issued to said company has been sold or hypothecated, to whom, and what amounts are now unsold?" I can only say that when the scrip is delivered to said company it passes beyond the control of this department, and there is nothing in my possession to enable me to answer except the fact that it was delivered to the representative of Messrs. Baring Brothers & Co., upon the order of the Boston, Hartford & Erie Railroad Company. I have always understood that it was pledged to the above-named house to secure moneys advanced, and that the scrip was consigned to them for sale.

All which is respectfully submitted.

JACOB H. LOUD, *Treasurer.*

PETITION OF R. L. DAY ET AL. IN REGARD TO THE STOCK BOOKS.

SUPREME JUDICIAL COURT, SUFFOLK, SS.
Filed Nov. 16, 1870.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

Respectfully represents R. L. Day and Henry E. Cobb, copartners in trade doing business in Boston in the County of Suffolk and Commonwealth of Massachusetts, under the form and style of R. L. Day & Cobb, in behalf of themselves and other stockholders of the Boston, Hartford and Erie Railroad Company, that they are stockholders in said Railway Company, and are desirous of settling and transferring on the books of said Company certain shares of said stock now owned by them and obtaining proper certificates therefor, that they are the owners of certain stock in said Company, which is credited to them on the books of said Company, for which they have no certificates, and are desirous of obtaining certificates therefor; that by a decree of this Court in the above matter passed on the Second day of August, A. D. eighteen hundred and seventy, among other provisions it was ordered adjudged and decreed, that James W. Converse, Otis Norcross and Thomas W. Pierce, all of said Boston, and George Talbot Olyphant of New York, and George M. Bartholomew of Hartford, be and they were thereby appointed Receivers of said Company, and that the stockholders should have free access to and use of the stock books, transfer books, and certificate books of said Company at all reasonable times and that the proper officers of said Company by said decree were directed to record any transfers of stock and make and issue certificates of stock as any of said stockholders might require, and that all of said stock books, transfer books and certificate books should unless otherwise ordered by the Court be kept at the principal office of said Receivers in Boston.

They further represent that they are informed and believe, that said stock books, transfer books, and certificate books have not been, and are not kept at the principal office of said Receivers in Boston and are not open and answerable to your petitioners and to other stockholders and that they are unable to make any transfers of their stock on the proper books of said Company kept for that purpose, or to obtain new certificates of stock, or to make any legal transfer of their stock, or to obtain certificates of stock, for the stock which stands credited to them on the books of said Company. And your petitioners aver that by reason thereof, they are unable to transfer the

stock that they have sold or to transfer any stock they are desirous of selling or to obtain certificates of stock which is credited to them on the books of said Company, and are also subject to great inconvenience and may be subjected to great loss thereby.

Wherefore your petitioners pray that said Company and the officers of said Company and said Receivers may be required forthwith to comply with so much of said decree as relates to the stock books, transfer books, and certificate books being kept at the principal office of said Receivers in Boston, and that they and other stockholders shall have free access to and use of said books at all reasonable times, and that they may be allowed to make any transfer of their stock on the proper books of said Company kept for that purpose as they may desire, and to receive from the proper officers of said Company new certificates of stock upon such transfer and that they may obtain proper certificates of the stock which now stands credited to them on the books of said Company, and that such other and additional remedies may be granted to them as shall by your Honors be deemed meet and proper.

R. L. DAY,
HENRY E. COBB.

SUFFOLK, ss. NOVEMBER 11th, 1870.

Subscribed and sworn to this eleventh day of November, A. D. 1870.
Before me.

THOMAS WESTON,
Justice of the Peace.

SUFFOLK, ss.

I, Henry E. Cobb, having my place of business in the City of Boston on oath declare, that I am a member of the firm of R. L. Day & Cobb, a copartnership having their place of business in Boston aforesaid. The business of our firm is that of Brokers and Stock Auctioneers. At the present time our said firm are the owners of Two Hundred and Twenty-five shares of the Capital Stock in the Boston, Hartford and Erie Railroad Company for which they have a certificate of stock, and of One Hundred and Thirty shares of said Stock credited to them on the books of said Company for which they have no certificates; that on the day of November, 1870, we sold one hundred and ninety-five shares of said stock for which we held certificate, to A. W. Spencer of Boston, for three and three fourths dollars per share, cash, stock to be delivered on the next day. We were unable to get access to the books of said Company to obtain certificates for that amount, and to meet this we were obliged to

borrow that number of shares from A. D. Lamson, which we did and delivered them to the said Spencer; that the Two Hundred and Twenty-five shares of said stock which they have, are in one certificate which they could not divide or apportion; that said One Hundred and ninety-five shares of said stock were borrowed of the said Lamson, with the agreement that they should be returned on demand: and that they are liable to have the said stock demanded of them at any time, and that they have no way of meeting that demand, except from the stock which they hold, viz: said Two Hundred and Twenty-five shares; that of the One Hundred and thirty shares of said stock which stands to our credit on the books of said Company, One Hundred shares have been sold to Paul M. Swayne of said Boston. At the time they were so sold the books of said Company were then open, and Mr. Swayne requested that we should keep said stock in our name until he should call for it. He has now made the demand on us for said stock, and the certificates therefor, which we are unable to comply with, as we cannot get certificates from said Company; that all of said stock is "Boston Stock," so called, and is not transferable in New York, and certificates thereof cannot be obtained from New York; that unless they can have access to said books for the purpose of making said transfers and obtaining said certificates all as aforesaid, they will be put to great loss and damage thereby.

HENRY E. COBB.

Subscribed and sworn to Nov. 16, 1870,

Before me,

THOMAS WESTON,

Justice of the Peace.

DEED OF TRUST.

This instrument made this twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-one, by and between the Receivers of the Boston, Hartford and Erie Railroad Company, party of the first part, and William T. Hart of Boston, party of the second part,

WITNESSETH:

That whereas, heretofore, in the suit of George Ellis and others against the Boston, Hartford and Erie Railroad Company and others, pending in the Supreme Judicial Court of Massachusetts, in the County of Suffolk, and in the suit of said Ellis against said corporation and others, pending in the Superior Court of Connecticut, in the County of Hartford, the following decrees in substance were passed by said several courts, as appears of record in said courts, to wit:

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, ss.

OCTOBER TERM, 1870.

GEORGE ELLIS AND OTHERS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS.

And now on this twenty-third day of December, A. D. 1870, upon the petition of James W. Converse and others, Receivers appointed by this Court, it being made to appear to the Court that it is for the best interest of all concerned in the Boston, Hartford and Erie Railroad, that that portion thereof lying between Putnam and Willimantic in the State of Connecticut, should be finished and made ready for use as speedily as practicable, and that the contract negotiated by said Receivers with Norman C. Munson is reasonable and proper to be executed for the purposes therein set forth, and that it is expedient that said Receivers or a majority of them should issue certificates of indebtedness for the purposes of said contract and for other purposes of their said trusts.

Now, therefore, it is hereby ordered and decreed by the Court that said Receivers or a majority of them be and they are hereby authorized and empowered to make, execute and deliver said contract with said Munson, substantially in the form hereto annexed and for the purposes aforesaid to make and issue their certificates of indebtedness, substantially in the form set forth in the instrument hereinafter mentioned, to the amount of four hundred thousand dollars, payable on or before the first day of January, A. D. 1874, with interest thereon at the rate of six per centum per annum, payable semi-annually, and said debts shall be and be held to be the Receivers' indebtedness in their official capacity as Receivers, and as such shall constitute a first and paramount lien over all other liens and incumbrances upon the railroad, real and personal estate and franchises of the said Boston, Hartford and Erie Railroad Company, except that portion thereof lying West of the Connecticut River and on the future earnings and income thereof, and shall be entitled to priority of payment over all other claims out of said earnings and income (except such expenses as may be necessarily or properly incurred in maintaining or operating said Boston, Hartford and Erie Railroad, and in the execution of the trusts of said Receivers of said railroad, and subject as hereinafter set forth,) until the same shall have been fully paid and discharged, whether said Receivers shall continue in the exercise of their said office as Receivers or shall have been superseded or discharged, and in case said railroad, real and

personal estate and franchise, or any part thereof, except said portion thereof lying West of said Connecticut River, shall be sold under and in pursuance of any judicial decree, the balance of said debts then remaining unpaid shall first, after the payment of said expenses as aforesaid and subject as hereinafter set forth, be paid out of the proceeds of said sale, and said Receivers or a majority of them are hereby authorized and empowered to mortgage and pledge, by an instrument substantially in the form hereto annexed, marked A, to the Trustee therein named for the holders of said certificates of indebtedness, said earnings and income, except as aforesaid, and subject as hereinafter stated, to secure the payment of said Receivers' indebtedness, and in case of default in the payment of said principal and interest of said indebtedness or any part thereof, said Receivers shall, after proper application made to this Court and obtaining its authority therefor, deliver to said Trustee possession and control of said railroad and the property necessary or proper for operating the same, except said portion thereof lying West of said Connecticut River, to be held and managed by him, receiving and applying the net earnings and income thereof, except as aforesaid, and subject as hereinafter stated to secure the payment of said certificates of indebtedness until the same shall be paid in full.

But said certificates of indebtedness and said pledge or mortgage shall be subject to all the rights of the Trustees for the bondholders of the Hartford, Providence and Fishkill Railroad now in possession of that portion of said Boston, Hartford and Erie Railroad, extending from Waterbury, in said State of Connecticut, to the City of Providence, in Rhode Island, and this decree shall not abridge or in any way affect any right of said Trustees to the possession of that portion of said railroad now held and operated by them or to the receipt of the income thereof, and shall also be subject to the pledge made by the Receivers of said Boston, Hartford and Erie Railroad Company to Elisha S. Converse to secure the payment of seventy thousand dollars borrowed of him for the purpose of preserving the rights of the Boston, Hartford and Erie Railroad Company under the lease made to it by the Norwich and Worcester Railroad Company, and shall also be subject to the rights of the lessors under said lease, and shall also be subject to such mortgages or pledges of the earnings of the railroads and the income from the property of said Boston, Hartford and Erie Railroad Company, as said Receivers may hereafter make under the authority of this Court, to secure the repayment of moneys which have been or may be borrowed by them for the purposes of their trusts as Receivers as aforesaid to amounts not exceeding in the aggregate one hundred thousand dollars outstanding at any one time, including so much of the said amount

borrowed of said Elisha S. Converse, as is now outstanding, and all other debts now outstanding contracted by said Receivers under any prior decree of said Courts, or either of them.

By the Court,

GEO. W. NICHOLS,
Assistant Clerk.

STATE OF CONNECTICUT.

SUPERIOR COURT, HARTFORD COUNTY.

DECEMBER TERM, 1870.

GEORGE ELLIS AND OTHERS *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY AND OTHERS.

And now at this present term of said Court, upon the petition of James W. Converse and others, Receivers appointed by this Court it being made to appear to this Court that it is for the best interest of all concerned in the Boston, Hartford and Erie Railroad, that that portion thereof lying between Putnam and Wilimantic, in the State of Connecticut, should be finished and made ready for use as speedily as practicable, and that the contract negotiated by said Receivers with Norman C. Munson is reasonable and proper to be executed for the purposes therein set forth, and that it is expedient that said Receivers or a majority of them, should issue certificates of indebtedness for the purposes of said contract and for other purposes of their said trusts.

Now, therefore, it is hereby ordered and decreed by the Court, that said Receivers or a majority of them be, and they are hereby authorized and empowered to make, execute and deliver said contract with said Munson, substantially in the form hereto annexed, and for the purposes aforesaid, to make and issue their certificates of indebtedness substantially in the form set forth in the instrument hereinafter mentioned, to the amount of four hundred thousand dollars payable on or before the first day of January, A. D. 1874, with interest thereon at the rate of six per centum per annum, payable semi-annually; and said debts shall be, and be held to be, the Receivers' indebtedness in their official capacity as Receivers, and as such, shall constitute a first and paramount lien over all other liens and incumbrances upon the railroad, real and personal estate and franchises of the said Boston, Hartford and Erie Railroad Company, except that portion thereof lying West of the Connecticut River, and on the future earnings and income thereof, and shall be en-

titled to priority of payment over all other claims out of said earnings and income (except such expenses as may be necessarily or properly incurred in maintaining or operating said Boston, Hartford and Erie Railroad, and in the execution of the trusts of said Receivers of said railroad, and subject as hereinafter set forth,) until the same shall have been fully paid and discharged, whether said Receivers shall continue in the exercise of their said office as Receivers or shall have been superseded or discharged, and in case said railroad, real and personal estate and franchise, or any part thereof, except said portion thereof lying West of said Connecticut River, shall be sold under and in pursuance of any judicial decree, the balance of said debts then remaining unpaid, shall first, after the payment of said expenses as aforesaid and subject as hereinafter set forth, be paid out of the proceeds of said sale; and said Receivers, or a majority of them, are hereby authorized and empowered to mortgage and pledge, by an instrument substantially in the form hereto annexed, marked A, to the Trustee therein named, for the holders of said certificates of indebtedness, said earnings and income, except as aforesaid and subject as hereinafter stated, to secure the payment of said Receivers' indebtedness; and in case of default in the payment of said principal and interest of said indebtedness or any part thereof, said Receivers shall, after proper application made to this Court, and obtaining its authority therefor deliver to said Trustee possession and control of said railroad and the property necessary or proper for operating the same, except said portion thereof lying West of said Connecticut River, to be held and managed by him, receiving and applying the net earnings and income thereof, except as aforesaid, and subject as hereinafter stated, to secure the payment of said certificates of indebtedness until the same shall be paid in full.

Provided that this decree and every part thereof is hereby declared to be made and passed without prejudice to any rights existing under any lien acquired by attachment on any suit against the Boston, Hartford and Erie Railroad Company of any lands other than depot grounds which lie outside of the location of the railroad of said Boston, Hartford and Erie Railroad Company between Willimantic and Mechanicsville, and which attachments were made prior to July 21st, 1870, or any mechanics' lien which may have been placed upon any portion of the road or buildings thereon, between said points aforesaid.

But said certificates of indebtedness and said pledge or mortgage shall be subject to all the rights of the Trustees for the bondholders of the Hartford, Providence and Fishkill Railroad, now in possession of that portion of said Boston, Hartford and Erie Railroad, extending from Waterbury, in said State of Connecticut, to the City of Providence, in Rhode Island; and this decree shall not abridge, or in any way affect

any right of said trustees to the possession of that portion of said railroad now held and operated by them, or to the receipt of the income thereof, and shall also be subject to the pledge made by the Receivers of said Boston, Hartford and Erie Railroad Company to Elisha S. Converse, to secure the payment of seventy thousand dollars borrowed of him for the purpose of preserving the rights of the Boston, Hartford and Erie Railroad Company, under the lease made to it by the Norwich and Worcester Railroad Company, and shall also be subject to the rights of the lessors under said lease, and shall also be subject to such mortgages or pledges of the earnings of the railroads, and the income from the property of said Boston, Hartford and Erie Railroad Company, as said Receivers may hereafter make, under the authority of this Court, to secure the repayment of moneys which have been or may be borrowed by them for the purposes of their trusts as Receivers as aforesaid, to amounts not exceeding in the aggregate; one hundred thousand dollars outstanding at any one time, including so much of the said amount borrowed of said Elisha S. Converse, as is now outstanding, and all other debts now outstanding, contracted by said Receivers under any prior decree of said Courts, or either of them.

By the Court,

(Signed,) CHAUNCEY HOWARD,
Clerk.

And whereas under and in conformity to said decrees, said Receivers have agreed to issue for the uses and purposes therein set forth certificates of indebtedness to the amount of four hundred thousand dollars, bearing even date, herewith numbered respectively from one to four hundred, inclusively, each for the sum of one thousand dollars, payable at the Continental National Bank in Boston, on or before the first day of January, in the year of our Lord one thousand eight hundred and seventy-four, with interest thereon, payable at said office half-yearly, on the first days of January and July in each year, at the rate of six per cent. per annum, and the principal of each of said certificates of indebtedness being also payable at the option of the Receivers of the Boston, Hartford and Erie Railroad Company, their successors or assigns, or of that company, its successors or assigns, on any day on which a half-yearly instalment of said interest shall fall due, and each certificate of indetedness being in the form following to wit:

No. —— $1,000.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Receivers' Certificate of Indebtedness.

Know all men by these Presents, that the Receivers of the Boston, Hartford and Erie Railroad Company acknowledge themselves indebted as such Receivers, unto William T. Hart or bearer, in the sum of one thousand dollars, which sum, they in their said capacity as Receivers as aforesaid promise to pay at the Continental National Bank in Boston, on or before the first day of January in the year one thousand eight hundred and seventy-four, with interest at the rate of six per centum per annum, payable semi-anuually on the first days of January and July in each year on presentation of this certificate, such payments to be endorsed hereon, and on any day on which interest is due hereon the Receivers of the Boston, Hartford and Erie Railroad Company, their successors or assigns or said Company or its successors or assigns shall be at liberty to pay off the principal and interest of this certificate of indebtedness and on electing so to do and tendering at said Bank payment of the principal sum of this certificate of indebtedness with the interest then due hereon, interest hereon shall cease.

This is one of a series of four hundred certificates of indebtedness of like tenor and even date herewith issued under and in pursuance of decrees made by the Supreme Judicial Court of the State of Massachusetts and the Superior Court of the State of Connecticut, in a case pending in each of said Courts in which George Ellis or George Ellis and others are plaintiffs and the Boston, Hartford and Erie Railroad Company is defendant, and in which cases said Receivers were appointed by said Courts, respectively.

To secure the payment of the principal and interest of said certificates of indebtedness there has been executed and delivered to William T. Hart, as Trustee, a certain instrument bearing even date herewith under and in pursuance of said decrees, which decrees declare that said debts shall be and be held to be the Receivers' indebtedness in their official capacity as Receivers, and as such shall constitute a first and paramount lien over all other liens and incumbrances upon the railroad, real and personal estate and franchises of said Boston, Hartford and Erie Railroad Company, except that portion thereof lying West of the Connecticut River, and also except certain attachments and liens specified in said Connecticut decree, and on the future earnings and income thereof, and shall be entitled to priority of payment over all other claims out of said earnings and income (except such

expenses as may be necessarily or properly incurred in maintaining or operating said Boston, Hartford and Erie Railroad, and in the execution of the trusts of the Receivers of said Railroad, and subject as hereinafter set forth) until the same shall have been fully paid and discharged, whether said Receivers shall continue in the exercise of their said office as Receivers or shall have been superseded or discharged, and that in case said railroad, real and personal estate and franchises, or any part thereof, except said portion lying West of said Connecticut River, shall be sold under and in pursuance of any judicial decree, the balance of said debts then remaining unpaid shall first after the payment of said expenses as aforesaid and subject as hereinafter set forth, be paid out of the proceeds of said sale, and that said Receivers or a majority of them are thereby authorized and empowered to mortgage or pledge to said Trustee for the holders of said certificates of indebtedness said earnings and income, (except as aforesaid, and subject as hereinafter stated,) to secure the payment of said certificates of indebtedness and that in case of default in the payment of said principal and interest of said indebtedness, or any part thereof, said Receivers shall, upon proper application made to each of said Courts and obtaining its authority therefor, deliver to said Trustee the possession and control of said railroad and the property necessary or proper for operating the same, except said portion lying West of said Connecticut River, to be held and managed by him, receiving and applying the net earnings and income thereof, (except as aforesaid and subject as hereinafter stated,) to the payment of said certificates of indebtedness until the same shall be paid in full; but that said certificates of indebtedness and said pledge or mortgage shall be subject to all the rights of the Trustees for the bondholders of the Hartford, Providence and Fishkill Railroad, now in possession of that portion of said Boston, Hartford and Erie Railroad, extending from Waterbury in said State of Connecticut, to Providence, in said State of Rhode Island, and that said decrees shall not abridge or in any way affect the right of said Trustees to the possession of that portion of said railroad now held and operated by them, and to the receipt of the income thereof, and shall also be subject to the pledge by said Receivers of said Boston, Hartford and Erie Railroad Company to Elisha S. Converse, to secure the payment of seventy thousand dollars borrowed of him for the purpose of preserving the rights of the Boston, Hartford and Erie Railroad Company, under the lease made to it by the Norwich and Worcester Railroad Company, and to such mortgages or pledges of the earnings of the railroad and the income from the property of said Boston, Hartford and Erie Railroad Company as said Receivers may hereafter make under the authority of said Courts, to secure the repayment of money which may be borrowed by them for the

purposes of their trusts as Receivers as aforesaid, to amounts not exceeding in the aggregate one hundred thousand dollars outstanding at any one time, including so much of said amount borrowed of said Elisha S. Converse as is now outstanding and all other debts now outstanding contracted by said Receivers under any prior decree of said Courts, or of either of them.

This certificate is issued with the express understanding and agreement with the holder for the time being hereof, that said Receivers do not personally bind themselves, nor does either of them personally bind himself for the payment of the indebtedness evidenced hereby or any part thereof, and with the express understanding and agreement that they shall not, nor shall either of them be subjected to any personal liability whatsoever upon or by reason of this certificate of indebtedness or the issuing hereof or anything herein contained.

This certificate of indebtedness shall not become obligatory until it shall have been authenticated by a certificate hereon duly signed by the Trustee.

In witness whereof, the said Receivers or a majority of them, under and in pursuance of the decrees aforesaid and not otherwise, have signed these presents on this day of in the year eighteen hundred and seventy.

} *Receivers.*

I hereby certify that this is one of the series of certificates of indebtedness above mentioned.

Trustee.

And whereas the intention of these Presents is, and is hereby declared to be that all said certificates of indebtedness shall be upon an equality as respects the security for the payment thereof, and that the same shall be paid out of the proceeds of the securities pro rata, and without preference or priority, and without discrimination with respect to the times of the actual issue thereof or the maturing of any interest which shall have accrued thereon,

Now this instrument

WITNESSETH:

That the parties of the first part under and by virtue of the decrees above recited, and of any other powers or authority them hereunto enabling and in consideration of the premises, and of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in order

to secure the payment of the principal and interest of the certificates of indebtedness aforesaid, issued or to be issued as herein recited and provided, and every part of said principal and interest, as the same shall become payable, according to the tenor of said certificates of indebtedness, do hereby agree with said party of the second part, and declare that said debts evidenced by said certificates of indebtedness are said Receivers' indebtedness in their official capacity as Receivers and as such shall, so far as the said decrees authorize the giving of a priority to said certificates of indebtedness, and enable said Receivers to give such priority as aforesaid, (except and subject as in said certificates of indebtedness set forth,) constitute a first and paramount lien over all other liens and incumbrances upon the railroad, real and personal estate and franchises of said Boston, Hartford and Erie Railroad Company, except that portion thereof lying West of Connecticut River, and on the future earnings and income thereof, and shall be entitled to priority of payment over all other claims out of the said earnings and income, (except and subject as in said certificates of indebtedness set forth,) until the same shall have been fully paid and discharged, whether said Receivers shall continue in the exercise of their said office as Receivers or shall have been superseded or discharged, and further agree in so far as by said orders they are legally authorized so to agree, that in case said railroad, real and personal estate and franchises or any part thereof shall be sold under and in pursuance of any judicial decree, the balance of said debts evidenced by said certificates of indebtedness, then remaining unpaid, shall (except and subject as in said certificates of indebtedness set forth,) be paid first out of the proceeds of said sale, and do, in so far as by said decrees they are legally authorized so to do, pledge and assign and convey in mortgage to said party of the second part, Trustee for the holders of said certificates of indebtedness, said earnings and income, (except and subject as in said certificates of indebtedness set forth,) to have and to hold the same unto the said party of the second part, his successor, heirs, executors, administrators and assigns but in trust nevertheless to secure the payment of said certificates of indebtedness, and the interest thereon, as herein declared, and for no other purpose whatsoever; provided, nevertheless, that if said Boston, Hartford and Erie Railroad Company, or its successors or assigns, or said Receivers or their successors or assigns shall well and truly pay to the holders of said certificates of indebtedness, upon the presentation thereof, at said Continental National Bank the principal and interest thereof, as the same shall become payable as aforesaid, then this instrument and said lien, and also said certificates of indebtedness, shall be absolutely void to all intents and purposes; and provided, also, that until the expiration of six

months after a default in a payment of said certificates of indebtedness or of some of them, or of the interest thereon, or of some part thereof, as the same shall become payable as aforesaid, said Receivers, their successors or assigns, or in case their said trust shall have ceased, said Boston, Hartford and Erie Railroad Company, its successors or assigns shall, unless it shall be otherwise ordered by the said Courts, have the actual possession, use, management and control of all said railroads and of the property hereby mortgaged and pledged, and shall have the right to receive the earnings and income of said railroads and property, to their use, and neither said Trustee, nor any of the holders of said certificates of indebtedness shall have any right to enter upon or take possession of said railroads, property, earnings or income.

But if said Boston, Hartford and Erie Railroad Company, and its successors and assigns, and said Receivers and their successors and assigns shall neglect or fail to pay, as aforesaid, said certificate of indebtedness, or any of them, or the interest, or any part of the interest thereon, when the same shall become payable and shall be presented at said Continental National Bank for payment as aforesaid, and said neglect or default shall have continued for the period of six months, then and in that case, and not otherwise, unless upon order by the Court, as aforesaid, said party of the second part, or his successor in said trust, shall have the right, and it shall be his duty to apply to the said Courts for authority to enter upon and take possession of said railroads and property, except that portion lying West of said Connecticut River, and hold and manage the same, and collect and receive the earnings and income thereof, and apply the same, (except and subject as in said certificates of indebtedness set forth,) to the payment of said certificates of indebtedness, until the same shall be paid in full, with interest, and upon obtaining such authority, possession and control of said property shall be given to said party of the second part accordingly, and it shall be his duty to do the acts so authorized.

And it is hereby mutually stipulated and agreed by and between the parties hereto that said mortgage, pledge and lien, and said certificates of indebtedness shall also be subject to all the rights of the Trustees for the bondholders of the Hartford, Providence and Fishkill Railroad Company, now in possession of that portion of said railroad of said Boston, Hartford and Erie Railroad Company, extending from Waterbury in said State of Connecticut to the City of Providence in the State of Rhode Island, and that neither said mortgage, pledge or lien, nor said certificates of indebtedness shall abridge, or in any way affect the right of said Trustees to the possession of that portion of said railroad now held and operated by them, and to the receipt of the income

thereof, and they shall also be subject to the pledge made by the Receivers of said Boston, Hartford and Erie Railroad Company to Elisha S. Converse, to secure the payment of seventy thousand dollars borrowed of him for the purpose of preserving the rights of the Boston, Hartford and Erie Railroad Company, under the lease to it made by the Norwich and Worcester Railroad Company, and shall also be subject to the rights of the lessors under said lease, and shall also be subject to such mortgages and pledges under the authority of said Courts of the earnings of the railroads, and the income from the property of said Boston, Hartford and Erie Railroad Company, as said Receivers may hereafter make to secure the repayment of moneys which have been or may be borrowed by them for the purposes of their trusts as Receivers, as aforesaid, to amounts not exceeding in the aggregate, one hundred thousand dollars, outstanding at any one time, including so much of the amount borrowed of said Elisha S. Converse as is now outstanding and all other debts now outstanding contracted by said Receivers under any prior decrees of said Courts, or of either of them.

And it is further mutually understood and agreed between the parties hereto that in the event of a vacancy arising from any cause in the trust herein vested in said William T. Hart, a successor to said Trustee in said trust may be appointed by the Supreme Judicial Court of Massachusetts for the County of Suffolk, or by any Judge of said Court in vacation, upon application of any party holding any of said certificates of indebtedness, or of said Boston, Hartford and Erie Railroad Company, or its successors or assigns, or of said Receivers, or their successors or assigns, and upon such notice as said Court, or said Judge may order to be given.

And it is further mutually stipulated and agreed that this instrument is executed and delivered with the express understanding and agreement that the said Receivers do not guarantee or warrant the validity thereof, or their authority to make the same, or the title under the same, and they do not personally bind themselves, nor does either of them personally bind himself for the payment of the indebtedness, evidenced by said certificates of indebtedness, or any part thereof, and with the express understanding and agreement that they shall not, nor shall either of them be subject to any personal liability whatsoever, by reason of the execution and delivery hereof, or anything herein contained.

And the party of the second part hereby accepting said trusts, covenants with said party of the first part, and with said holders of said certificates of indebtedness, that he will faithfully perform his duties

as Trustee, but he shall not be liable for any loss or injury to said property, unless the same shall arise or occur through his own wilful misfeasance or default.

In witness whereof a majority of said Receivers and said William T. Hart have hereunto set their hands and seals the day and year first above written.

J. W. CONVERSE, [L. S.]
GEO. M. BARTHOLOMEW, [L. S.]
J. GRAHAME GARDINER, [L. S.]
Receivers.

WM. T. HART.

Signed, sealed and delivered in presence of
BENJAMIN F. BROOKS,
FITZ H. RICE.

$200 Int. Rev. Stamp.

$200 Int. Rev. Stamp.

COMMONWEALTH OF MASSACHUSETTS, *ss.:*

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of a paper designated as a "deed of trust from Receivers of the Boston, Hartford and Erie Railroad Company to William T. Hart," filed in said Court April 29th, 1871, in the cause of George Ellis *et al.*, *vs.* Boston, Hartford and Erie Railroad *et als.*, which is now pending in said Court.

Witness my hand and the seal of said Court, this sixtenth day of August, A. D. 1881. [L. S.]

HENRY A. CLAPP,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
IN EQUITY.

GEORGE ELLIS ET AL *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET AL.

This case having been fully heard and considered before the full Court upon the bill, answers, and agreed statement of facts, and the same having been decided therein, and a rescript thereof having been filed, it is now, in accordance therewith, on this twenty-fourth day of April, A. D. eighteen hundred and seventy-one, declared, ordered, adjudged and decreed, that Moses Kimball, of Boston, Thomas Talbot, of Billerica, and Avery Plumer, of Boston, are by valid appointments, conveyances, and succession, in accordance with the terms of the mortgage hereinafter referred to, duly constituted successors to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis in the trusts created and declared in and under the mortgage made by said Boston, Hartford and Erie Railroad Company to said Berdell, Gregory and Davis dated March 19th, 1866, referred to in said bill, and are in law the present trustees under said mortgage; and that all the property, estate, franchises, rights, title, interest, trusts and powers which were by or under said mortgage conveyed to or vested in said Berdell, Gregory and Davis, are now vested by valid title in said Kimball, Talbot and Plumer, as trustees under said mortgage.

By the Court,

April 24, 1871. GEO. C. WILDE, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of a decree entered by the said Court April 24, 1871, in the cause of George Ellis *et al vs.* Boston, Hartford and Erie Railroad Company, *et als.* which is now pending in said court.

Witness my hand and the seal of said court this sixteenth day of August, A. D. 1881.

HENRY A. CLAPP,
Assistant Clerk.

SUPREME JUDICIAL COURT, SUFFOLK, ss.

IN RE GEORGE ELLIS ET ALS IN EQUITY *vs.* THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY ET ALS.

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity within and for the County of Suffolk.

And now comes William T. Hart, of Boston, in said County of Suffolk, George Talbot Olyphant, of Greenburg, in the County of Westchester, and State of New York, and Charles P. Clark, of Newton, in the County of Middlesex, and State of Massachusetts, and respectfully represent to your Honors that on the tenth day of July, A. D. 1871, Moses Kimball and Thomas Talbot, trustees under the mortgage described and referred to in the bill in the above entitled cause and the cause of action therein set forth resigned as trustees, under said mortgage in the manner therein provided, and that thereafter on the fourteenth day of said July, Avery Plumer, being then the sole continuing trustee under said mortgage, appointed them, the said William T. Hart and Charles P. Clark, trustees under said mortgage in the manner therein provided, and they accepted said trust in due form and by proper instruments, copies of all of which are hereto annexed, marked I, and that thereafter on the seventeenth day of said July, the said Avery Plumer duly resigned as trustee under said mortgage according to the provisions therein contained, a copy of which resignation is hereto annexed, marked K, and that thereafter they the said William T. Hart and Charles P. Clark, being the then trustees under said mortgage, on the nineteenth day of said July, appointed, according to the provisions of said mortgage, the said George Talbot Olyphant, trustee thereunder, and the said George Talbot Olyphant duly accepted the said trust, all which appears by the papers hereto annexed, marked L, and made a part of this petition. Wherefore your orators pray that they having been as aforesaid duly made and appointed trustees under the aforesaid mortgage and accepted the said trust, may be made parties defendant to the above entitled cause as trustees as aforesaid, and may be declared and confirmed as trustess under said mortgage, and successors in the trust created by the said mortgage and under the decree of the court in the cause passed the 9th day of May, A. D. 1871.

WM. T. HART,
GEO. TALBOT OLYPHANT,
BY W. T. HART,
CHARLES P. CLARK.

SUPREME JUDICIAL COURT, SUFFOLK COUNTY.

AT CHAMBERS, BOSTON, July 28, 1871.

GEORGE ELLIS ET AL *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

And now the foregoing petition having been considered by the Court, it is ordered, adjudged, and decreed, that the petitioners therein named, William T. Hart, George Talbot Olyphant, and Charles P. Clark, are, by valid succession and appointment, the present trustees under the mortgage referred to in the complainants bill, and as such trustees are the successors in the trusts created by said mortgage; and that the prayer of said petitioners to be admitted as parties defendant to said suit is hereby granted.

HORACE GRAY, JR., *Justice.*

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk; vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing are true copies respectively of the petition of William T. Hart, *et al*, to be made parties, and of the decree of said Court therein, filed and entered in said court in the cause of George Ellis *et al, vs.* Boston, Hartford and Erie Railroad *et als,* which is now pending in said court.

Witness my hand and the seal of said court, this sixteenth day of August, A. D. 1881.

HENRY A. CLAPP,

[L. S.] *Assistant Clerk.*

SUPREME JUDICIAL COURT, SUFFOLK, ss.

GEORGE ELLIS ET AL. IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

To the Honorable the Justices of the Supreme Judicial Court in and for the County of Suffolk.

Respectfully represent unto your Honors James W. Converse, George M. Bartholomew, and J. Grahame Gardiner, Receivers appointed in the above entitled cause.

That they believe that they have fully performed and discharged all the duties which devolved upon them as such Receivers, and that in their opinion there exists no necessity for their further continuance in office as Receivers, and they herewith submit their final account and pray that the same may be allowed, including the amounts therein charged for the services and expenses of the Receivers since the last allowance by this court, and that they may be discharged as such Receivers, and ordered to pay the balance remaining in their hands as this honorable court shall direct.

GEO. M. BARTHOLOMEW,
J. W. CONVERSE,
J. GRAHAME GARDINER. } *Receivers.*

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of petition of Receivers to be discharged (without their final account) filed in said court August 15, 1879, in the cause of George Ellis *et al*, *v.* Boston, Hartford and Erie Railroad *et als*, which is now pending in said court.

Witness my hand and the seal of said court, this sixteenth day of August, A. D. 1881.

HENRY A. CLAPP,
Assistant Clerk.

SUPREME JUDICIAL COURT, SUFFOLK, ss.

GEORGE ELLIS et al, In Equity, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, et als.

The New York and New England Railroad Company acknowledge that they have received, pursuant to the decree made in the above entitled cause, on the ninth day of September, A. D. eighteen hundred and seventy-nine, the sum of two hundred and eighty-two dollars and ninety-five cents, from the Receivers in this cause.

GEO. B. PHIPPEN, *Treasurer,*
New York and New England Railroad Co.

Boston, Sept. 11th, 1879.

Commonwealth of Massachusetts.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of an "acknowledgment" of the New York and New England Railroad Company, filed in said court September 11, 1879, in the cause of George Ellis *et al v.* Boston, Hartford and Erie Railroad *et als,* which is now pending in said court.

Witness my hand and the seal of said court, this sixteenth day of August, A. D. 1881.

HENRY A. CLAPP,
[L. S.] *Assistant Clerk.*

SUPREME JUDICIAL COURT, SUFFOLK, ss.

GEORGE ELLIS et al In Equity, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, et als.

DECREE.

Whereas, by a decree of this Court, made in this cause on the ninth day of September, A. D. eighteen hundred and seventy-nine, it was ordered that James W. Converse, George M. Bartholomew, and J. Grahame Gardiner, the Receivers in this cause, pay to the New York

and New England Railroad Company, the sum of two hundred and eighty-two and $\frac{95}{100}$ dollars, the amount of money then in the hands of said Receivers, and that upon payment thereof and the exhibition of satisfactory evidence thereof to this court, that said Converse, Bartholomew, and Gardiner, the Receivers, should be discharged from office as Receivers, and whereas said Receivers have in pursuance of said decree paid said sum to said New York and New England Railroad Company, and have exhibited to this Court satisfactory evidence of said payment:

It is now on this twelfth day of September, A. D. eighteen hundred and seventy-nine, ordered, that said Converse, said Bartholomew, and said Gardiner, be discharged from office as Receivers.

By the Court,

September 12, 1879. JOHN NOBLE, *Clerk.*

We assent to the foregoing decree,

NEW YORK AND NEW ENGLAND RAILROAD CO.,
By G. W. BALDWIN,
its Attorney.

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court, for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of a decree entered by the said Court September 12, 1879, in the cause of George Ellis *et al v.* Boston, Hartford and Erie Railroad *et als*, which is now pending in said Court, and assent thereto.

Witness my hand and the seal of said Court, this sixteenth day of August, A. D. 1881.

HENRY A. CLAPP,
[L. S.] *Assistant Clerk.*

SUPREME JUDICIAL COURT.

SUFFOLK, SS.—SEPTEMBER TERM, 1879.

GEORGE ELLIS ET AL., IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

DECREE

ALLOWING RECEIVERS' ACCOUNTS AND IN RESPECT TO DISCHARGING THE RECEIVERS FROM OFFICE.

This Court, on the twenty-fourth day of April, A. D. eighteen hundred and seventy-one, having decided and decreed in this cause, that Moses Kimball, of Boston, Thomas Talbot, of Billerica, and Avery Plumer, of Boston, were then in law the Trustees under the mortgage referred to in the bill of complaint in this cause made by the Boston, Hartford and Erie Railroad Company to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, dated on the nineteenth day of March, A. D. eighteen hundred and sixty-six, and a decree having been entered in this cause on the ninth day of May, A. D. eighteen hundred and seventy-one, among other things ordering upon the compliance with certain terms therein set forth, the Receivers in this cause to deliver into the possession and control of said Trustees or their successors in office all the roads, railways, property and franchises which said Receivers had in their hands or possession or under their management or control as such Receivers, and among other things also ordering said Trustees or their successors in office upon taking possession as set forth in said decree to file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice acknowledged before a Notary Public that they have taken possession of the mortgaged property, franchise, and estate for default in the payment of the interest on the bonds secured by said mortgage, and of their purpose to foreclose said mortgage for said default, and that if default in the performance of the condition of said mortgage continued for the space of eighteen months after such notice was filed, the whole of the mortgaged premises and franchises conveyed by said mortgage should vest absolutely and in fee in said Trustees and their successors in office without further assurance and without further process of law, and all right or equity of redemption of said Boston, Hartford and Erie Railroad Company therein should be forever barred and foreclosed, but if the whole of the principal and interest of said bonds in arrear with interest thereon when the same might by law be demanded and the lawful claims, disbursements, and liabilities of said Trustees and their successors in said office which

might be made or incurred on account of their trust and all the certificates of indebtedness referred to in said last mentioned decree and a proper compensation to said Trustees and their successors for services should be paid and satisfied within said period of eighteen months after said notice had been filed, either by said Boston, Hartford and Erie Railroad Company or out of the net earnings of the property in the possession of the Trustees or their successors, then that said Trustees and their successors should render to said Boston, Hartford and Erie Railroad Company possession of said mortgaged property, franchises, and estate, and of all the additions made by them thereto, and that said Boston, Hartford and Erie Railroad Company should thereupon become entitled to the possession thereof without further assurance, but still snbject to said mortgage so far as the bonds secured thereby then remained unpaid, but that said Trustees and their successors should take the property, estate and franchises aforesaid, subject to the lien, mortgage and pledge created by the Receivers by the instrument referred to in said last mentioned decree, dated on the twentieth day of January, A. D. eighteen hundred and seventy-one, and also subject to the contract referred to in said last mentioned decree between the Receivers and Norman C. Munson, and said terms upon the compliance of which said Receivers were to deliver into the possession and control of said Trustees or their successors in office all the roads, railways, property and franchises aforesaid having been complied with, and said Receivers having delivered into the possession and control of William T. Hart, George Talbot Olyphant and Charles P. Clark, who were then the Trustees under said first mentioned mortgage by valid succession and appointment, said roads, railways, property and franchises, and said Hart, Olyphant and Clark as such Trustees having taken possession thereof, and upon taking possession thereof as aforesaid, having filed in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice as aforesaid, and default in the performance of the condition of said first mentioned mortage having continued for the space of eighteen months after such notice was filed, and the interest in arrear on said bonds and the lawful claims, disbursements and liabilities of said Trustees and their successors in said office which were made or incurred on account of their trust and the certificates of indebtedness aforesaid and a compensation to said Trustees and their successors for services, not having been paid or satisfied within said period of eighteen months after said notice was filed, either by said Boston, Hartford and Erie Railroad Company or out of the net earnings of the property in the possession of said Trustees or their successors in office, (no part of the principal of said bonds having been paid

by said Boston, Hartford and Erie Railroad Company, or out of the net earnings aforesaid,) and the whole of the mortgaged premises and franchises conveyed by said first mentioned mortgage, having, pursuant to the provisions of said last mentioned decree, vested absolutely and in fee in said Trustees and their successors in office, and all right or equity of redemption of said Boston, Hartford and Erie Railroad Company therein having been forever barred and foreclosed, and said William T. Hart and Charles P. Clark, the surviving Trustees, having, pursuant to a decree of this Court made on the twelfth day of June, A. D. eighteen hundred and seventy-five, executed and delivered to the New York and New England Railroad Company the deed therein referred to of the mortgaged premises and franchises, and delivered to said New York and New England Railroad Company, all and singular the property included in said deed, and said certificates of indebtedness having been paid and said contract between said Receivers and said Munson having been performed on the part of said Receivers, and said Receivers having rendered their final account in this case;

Now, it is hereby ordered, adjudged and decreed, that said Receivers be, and they hereby are allowed for their compensation and expenses, since the last allowance made by this Court, the sums charged therefor in their accounts since such last allowance, and that said Receivers' accounts be and the same are hereby approved and allowed.

And it appearing to the Court that said Receivers have on hand two hundred and eighty-two and $\frac{95}{100}$ dollars in money, and have delivered to the New York and New England Railroad Company the following coupons of the bonds of the Hartford, Providence and Fishkill Railroad Company which they recovered of Henry N. Farwell, viz: seven hundred and fifteen coupons due July 1st, 1857, each for thirty-five dollars: one hundred and fifteen coupons due July 1st, 1857, each for seventeen and $\frac{50}{100}$ dollars; three coupons due July 1st, 1857, for fifty-two and $\frac{50}{100}$ dollars each; five coupons due July 1st, 1857, one for one hundred and five dollars, one for fifty-four and $\frac{43}{100}$ dollars, one for twenty-one dollars, one for fourteen dollars, one for six and $\frac{13}{100}$ dollars; four hundred coupons due January 1st, 1858, each for thirty-five dollars; one coupon due January 1st, 1858, for seventeen $\frac{50}{100}$ dollars; three hundred and eighty-four coupons due July 1st, 1857, each for thirty-five dollars; and five hundred coupons each for thirty-five dollars; it is hereby ordered that said delivery of said coupons be and the same is hereby approved and confirmed, and that said Receivers pay to the said New York and New England Railroad Company said sum of two hundred and eighty-two and $\frac{95}{100}$ dollars, and that upon payment thereof and the exhibition of satisfactory evidence thereof to

this Court, it is ordered, that James W. Converse, George M. Bartholomew and J. Grahame Gardiner, the Receivers, be discharged from office as Receivers.

By the Court,

JOHN NOBLE, *Clerk.*

September 9th, 1879.

We assent to this decree,

NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
By G. W. BALDWIN,
Attorney.

WM. T. HART,
CHARLES P. CLARK,
Surviving Trustees.

The assignees of the B. H. & E. do not object to the within, and do not want to be heard thereon.

J. J. STORROW,
for Assignees.

COMMONWEALTH OF MASSACHUSETTS:

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of the decree entered by said Court, September 9th, 1879, in the cause of George Ellis *et al.*, *vs.* Boston, Hartford and Erie Railroad Company, *et als.*, which is now pending in said Court, and of assents endorsed therein.

Witness my hand and the seal of said Court, this sixteenth day of August, A. D. 1881.

[L. S.]

HENRY A. CLAPP,
Assistant Clerk.

EXHIBIT C.

NOTICE.—A meeting of the stockholders of the Boston, Hartford and Erie Railroad Company will be held at the office of the Company, No. 12 Pemberton Square, Boston, on the 21st inst., at 11 o'clock, a. m., to see if said Company will accept the Act of the Legislature of Connecticut amending or changing the charter of the Company, and empower the Directors to do the acts and things authorized in said Acts.

THOMAS E. GRAVES,
Secretary.

BOSTON, July 15th, 1870.

COMMONWEALTH OF MASSACHUSETTS:

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of a printed paper or slip marked "Exhibit C," and annexed to the original bill of complaint filed in said Court July 20th, 1870, in the cause of George Ellis, *et al.*, *vs.* Boston, Hartford and Erie Railroad, *et als.*, which is now pending in said Court.

Witness my hand and the seal of said Court, this sixteenth day of August, A. D. 1881.

[L. S.]

HENRY A. CLAPP,
Assistant Clerk.

SUPREME JUDICIAL COURT.

SUFFOLK, SS.

GEORGE ELLIS, ET AL., IN EQUITY, *vs.* BOSTON HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

The Master's report in the above named action upon the order relative to the petition of George Talbot Olyphant for leave to resign his office as Receiver having been recommitted at the Master's request, is hereby amended by adding the following:

"And said Master further reports to the Court that a resonable and proper compensation to be allowed said Olyphant for his services as Receiver is seven thousand nine hundred and sixty-six and $\frac{67}{100}$ dollars, of which sum thirty-seven hundred dollars have been paid to him leaving as a balance due him the sum of four thousand two hundred and sixty-six and $\frac{67}{100}$ dollars, and for the reasons for fixing upon this sum, the Master respectfully refers the Court to his report in this case filed June 24th, 1871."

HORACE H. COOLIDGE,
Master in Chancery.

BOSTON, July 28th, 1871.

COMMONWEALTH OF MASSACHUSETTS:

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the foregoing is a true copy of the "the Master's supplementary report on order relative to resignation of George Talbot Olyphant," filed in said Court July 28th, 1871, in the cause of George Ellis, *et al.*, *vs.* Boston, Hartford and Erie Railroad, *et als.*, which is now pending in said Court.

Witness my hand and the seal of said Court, this sixteenth day of August, A. D. 1881.

[L. S.]

HENRY A. CLAPP,
Assistant Clerk.

SUPREME JUDICIAL COURT, SUFFOLK, ss.

GEORGE ELLIS ET AL, IN EQUITY, *vs.* BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET ALS.

This Court, on the twenty-fourth day of April, A. D. eighteen hundred and seventy-one, having decided and decreed that Moses Kimball of Boston, Thomas Talbot of Billerica, and Avery Plumer of Boston, are in law the present Trustees under the mortgage referred to in the bill of complaint in this cause made by the Boston, Hartford and Erie Railroad Company to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, dated on the 19th day of March, A. D. eighteen hundred and sixty-six.

It is now, on this ninth day of May, A. D. eighteen hundred and seventy-one, ordered, adjudged and decreed by the Court, that upon the payment by said Trustees, or their successors in office, to the parties in this cause, of their reasonable expenses and counsel fees in this cause, and upon the payment to said Receivers by said Trustees or their successors, of all sums of money which said Receivers have theretofore advanced or borrowed under the order of this Court including what they have borrowed of Elisha S. Converse (not theretofore repaid) with interest thereon from the times when the same were advanced or borrowed, and of a proper compensation to the Receivers for their services, and upon payment by said Trustees or their successors in office, of all debts, and liabilities, and damages, so far as the same can be now fixed and ascertained, which have theretofore been incurred by said Receivers, or which they theretofore have become liable for, except the certificates of indebtedness which have been or may be hereafter issued under and in pursuance of the decree of said Court dated December 23rd, 1870, and secured by an instrument of mortgage or pledge executed by said Receivers in pursuance of the decree last mentioned and William T. Hart, bearing date January twentieth, A. D. 1871, and also except the contract between said Receivers and Norman C. Munson, dated January 20, A. D. 1871, described in said instrument of mortgage or pledge, copies of which instrument and contract are filed in said cause, and upon securing, by said Trustees, of the payment of all such debts, liabilities and damages except as aforesaid, which may be contingent or unliquidated to the satisfaction of

said Receivers, or in pursuance of an order of this Court to be hereafter made therefor in this cause; all said sums and claims to be ascertained and determined as hereinafter provided, by the master appointed by this decree; the Receivers in this cause, deliver into the possession and control of said Trustees or their successors in office, all the roads, railways, property and franchises which they, the said Receivers have in their hands or possession or under the management or control as such Receivers.

And it is further ordered, adjudged and decreed that the said Trustees or their successors in office, upon being put in possession as aforesaid shall, as such Trustees have the right, power and authority by themselves, their officers, agents and employees, to take, receive and operate all said railways, roads, property and franchises, and receive and have the rents, earnings, income and profits thereof and therefrom, and to use and apply such part of said rents, income and profits as shall in their judgment be necessary to the payment of the running and operating expenses of the said railways and roads, including the necessary repairs of road, road-bed, buildings, machinery and equipment, and all expense of agents, clerks, officers, employees and laborers, and all claims for damages against said Trustees or their successors in office, and to the payment for insurance and taxes on the property, and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvements of said roads, buildings, machinery, and equipments as the business shall in their judgment require, and to the payment of any and all claims, if any, necessary to secure and assure to them the estate and franchises conveyed by said first mentioned mortgage, and to their own compensation, and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a Court of Equity in a case of a Receiver as settled and established in the case of the Receivership of the New York and Erie Railroad.

And said Trustees or their successors in office shall keep full and accurate accounts of all sums received or paid out by them, which shall at all reasonable times be open to the inspection of said Boston, Hartford and Erie Railroad Company and of the holders of bonds secured by said first mentioned mortgage, and said Trustees or their successors shall at least once a year publish abstracts thereof for the use of the holders of said bonds.

And said Trustees or their successors in office, upon taking possession as aforesaid, shall file in the office of the Secretaries of State of the States of Massachusetts, Rhode Island, Connecticut and New York, a written notice, acknowledged before a Notary Public, that

they have taken possession of said mortgaged property, franchises and estate for default in the payment of the interest on said bonds and with their purpose to foreclose said first mentioned mortgage for said default.

And, if default in the performance of the condition of that mortgage shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises conveyed by that mortgage shall vest absolutely and in fee in said Trustees and their successors in office without further assurance and without further process of law, and all right or equity of redemption of said Boston, Hartford and Erie Railroad Company therein shall be forever barred and foreclosed; but if the whole of the principal and interest of said bonds in arrear with interest thereon when the same may by law be demanded, and the lawful claims, disbursements and liabilities of said Trustees and their successors in said office which may be made or incurred on account of their trust, and all the certificates of indebtedness aforesaid, and a proper compensation to the Trustees and their successors for services shall be paid and satisfied within said period of eighteen months after said notice shall have been filed either by said Boston, Hartford and Erie Railroad Company, or out of the net earnings of the property in the possession of the Trustees or their successors, their said Trustees and their successors shall render to said Boston, Hartford and Erie Railroad Company possession of said mortgaged property, franchises and estate, and of all the additions made by them thereto, and said Boston, Hartford and Erie Railroad Company shall thereupon become entitled to the possession thereof without further assurance but still subject to said first mentioned mortgage so far as the bonds secured thereby then remain unpaid.

But said Trustees and their successors shall take the property, estate and franchises aforesaid subject to the lien, mortgage and pledge created by said Receivers by said instrument dated January 20, A. D. 1871, and also subject to said contract between said Receivers and said Munson, which contract is hereby declared valid and binding upon said Trustees as Trustees, but not personally, and which lien, pledge and mortgage are hereby declared to be in full force, and a paramount lien, as set forth in said decree of this Court, passed December 23rd, 1870.

Provided however, that in case upon the coming in of the report of the Master in this cause hereinafter ordered, it shall appear to the Court expedient that a foreclosure of said mortgage shall take place by sale of the mortgaged property or otherwise, within said period of eighteen months, in such manner as this Court shall order, nothing in

this decree contained shall be construed to preclude any party to this cause from making application for such other and earlier foreclosure of said mortgage or this Court from passing the proper orders and decrees therefor.

And until the full payment and satisfaction or securing of all sums of money advanced or borrowed by said Receivers as aforesaid, and of all debts, liabilities and damages incurred by them as aforesaid, of all costs, expenses, counsel fees and compensation as above provided, the said Receivers shall retain and keep absolute possession of all the property of said Boston, Hartford and Erie Railroad Company heretofore passed into their possession under the order of this Court appointing them Receivers, and the same shall be continued in their hands and possession and under their management and control as such Receivers.

And said Trustees and their successors shall make a report under oath to this Court as often as once in every six months of their receipts and expenditures as such Trustees.

And Horace H. Coolidge, a Master in Chancery of this Court, is hereby appointed to ascertain and report to this Court, all sums of money which are to be paid by said Trustees to said Receivers, including all sums of money which said Receivers have theretofore advanced or borrowed under the order of the Court, including what they have borrowed of Elisha S. Converse (not theretofore repaid) with interest thereon, and all debts, liabilities and damages so far as the same can be now fixed and ascertained which have been incurred by said Receivers (except as aforesaid), and a proper compensation to the Receivers for their services, and also all expenses, costs and counsel fees which have been incurred in the prosecution of this suit by the several parties thereto, to be allowed to said parties; and also as nearly as may be, to ascertain and report the amount of liabilities contingent and unliquidated incurred by said Receivers for which they are in any way liable, to be secured as hereinbefore ordered, and the form, manner and amount and sufficiency of such security. And said Master is further ordered to report to this Court the results of the operation of the railroad in the possession of said Receivers during the time the same has been in their possession, and the amount of the receipts and expenditures of said Receivers during said period, and the condition of the property in their possession.

And said Receivers are continued in office until the further order of this Court.

And either party may apply to the Court for further order or direction as occasion may require.

By the Court,

GEO. C. WILDE, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court, for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the within is a true copy of the decree of foreclosure entered by said Court in the cause of George Ellis *et al, vs.* Boston, Hartford and Erie Railroad Company *et als*, now pending in said Court.

Witness my hand and the seal of said Court, this twenty-
[L. S.] seventh day of August, A. D. 1881.

HENRY A. CLAPP,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, ss.:

To Mark Healey, of Lynn, in our County of Essex, your agents, attorneys and counsellors, and each and every of them,

GREETING:

Whereas it has been represented unto us, in our Supreme Judicial Court, by William T. Hart, George Talbot Olyphant, and Charles P. Clark, the Trustees under a certain mortgage made under date of March 19th, 1866, by the Boston, Hartford and Erie Railroad Company to Robert H. Berdell and others, and bringing said bill in said capacity, complainants, that they, said complainants, have exhibited a bill of complaint in our said court against you, the said Mark Healey, wherein said complainants, among other things, pray for a writ of injunction against you, the said respondent:

We, therefore, in consideration of the premises, do strictly enjoin and command you, the said respondent, and all and every the persons before named, to desist and refrain from selling the following described property or any part thereof, namely, a certain wharf, flats and lot of land, with the buildings thereon, situated in said Boston and bounded and described as follows, beginning at the southeast corner on

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Brood street, thence running on said street one hundred and six feet, more or less, to land now or late of Thomas Tileston, thence southeasterly thirty-two feet, thence southwest about six feet to a range line with the capsill on the southwest side of Tileston's short wharf so called, thence southwesterly by said range line of said capsill to the dock, about ten feet, more or less, then continuing said course by the said capsill to the channel or line established by the Commissioners of the Harbor of Boston, be the distance more or less, thence southwesterly by said channel or Commissioners' line, until it meets the division line between these premises and the estate late of Robbins, now of Thomas Richardson, thence by the flats and wharf of said Richardson to the first mentioned bound, with all the privileges and appurtenances thereto belonging, being the same estate and property referred to in said bill: and likewise enjoin you from taking any measures to foreclose the mortgage upon said premises held by you described in said bill, but you are not enjoined from adjourning from time to time, any advertised auction sale of the same until the further order of our said court, or some justice thereof.

[L. S.] Witness, Horace Gray, Esq., at Boston, the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and seventy-two.

A true copy, attest,

GEO. C. WILDE,
Clerk.

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the within is a true copy of a writ of injunction issued by said Court, January 27th, 1872, in the cause of George Ellis *et al, vs.* Boston, Hartford and Erie Railroad *et als,* now pending in said court.

[L. S.] Witness my hand and the seal of said court, this twenty-seventh day of August, A. D. 1881.

HENRY A. CLAPP,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT, SUFFOLK, ss.
IN EQUITY.

WILLIAM T. HART ET AL., *vs.* JOHN S. ELDRIDGE ET AL.

DEMURRER

OF THE SAID DEFENDANT JOHN S. ELDRIDGE.

The said defendant, John S. Eldridge, demurs to the complainant's bill of complaint and for causes of demurrer assigns the following, to wit:

1st. That said bill does not set out any breach of his trust by this defendant.

2nd. That said bill is wanting in Equity.

3rd. That Charles S. Bradley, George M. Barnard and Charles R. Chapman, alleged in said bill to be the assignees in bankruptcy of said Boston, Hartford and Erie Railroad Corporation, are not such assignees.

4th. That, if said Bradley, Barnard and Chapman are assignees in bankruptcy as alleged in said bill, they are not proper parties to said bill.

5th. That it does not appear by said bill that the period of time during which prior bondholders and mortgagees were entitled to exchange their securities for said new mortgage bonds, and during which enough of said new bonds were to be placed and kept with said Trustees to effect said exchange, had not expired before the said defendant Eldridge became Trustee.

6th. That the allegations of said bill are not sufficiently positive, explicit and definite.

7th. That said bill is otherwise deficient and imperfect, and in other respects fails to show any ground for relief in equity as against this defendant.

By RICHARD OLNEY,
Solicitor.

B. F. THOMAS
and
RICHARD OLNEY,
of Counsel.

SUFFOLK, SS.:

BOSTON, December 27th, 1872.

I hereby certify that the foregoing demurrer is not intended for delay.

A true copy, attest.

RICHARD OLNEY.

COMMONWEALTH OF MASSACHUSETTS.

I, Henry A. Clapp, Assistant Clerk of the Supreme Judicial Court for the County of Suffolk, vested by law with authority to perform all the duties of a Clerk, hereby certify that the within is a true copy of the demurrer of John S. Eldridge, filed in said court December 27, 1872, in the cause of George Ellis *et al. vs.* Boston, Hartford and Erie Railroad Company, *et als.* now pending in said court.

Witness my hand and the seal of said Court, this twenty-seventh day of August, A. D. 1881.

[L. S.]

HENRY A. CLAPP,
Assistant Clerk.

280 The following is the opinion of the court, in accordance with which the decree was entered in this cause on the seventeenth day of February, A. D. 1883, namely:

Opinion of the Court. [*January* 15, 1883.]

Circuit Court of the United States, District of Massachusetts.
Equity.

WILLIAM F. GRAHAM
v.
BOSTON, HARTFORD & ERIE R. R. Co. *et al.* } 1426.

NELSON, J.:

This is a bill in equity, filed July 8, 1880, by a shareholder in the Boston, Hartford & Erie Railroad Company, in behalf of himself and every shareholder and creditor of the company, to set aside as invalid a mortgage given by the company on its railroad, franchise, and property to Robert H. Berdell, Dudley T. Gregory, and John C. Bancroft Davis, as trustees, to secure the payment of an issue of bonds of the company to the amount of twenty millions of dollars.

The defendants are The Boston, Hartford & Erie Railroad Company and its assignees in bankruptcy, The New York & New England Railroad Company, which is at present in possession of and operating the railroad; certain persons now living, and the personal representatives of others now deceased, who have, at different times, acted as trustees under the mortgage; The Treasurer and Receiver General of the Commonwealth of Massachusetts, George Ellis, Frederick A. Lane, and W. C. Eayrs.

The case was heard upon separate demurrers to the bill, filed by the New York & New England Railroad Company, by the
281 assignees of the Boston, Hartford & Erie Railroad Company, by Hart & Clark, two of the trustees, and by the executrix of Mark Healey, a deceased trustee. Among the causes of demurrer assigned by each of these defendants are want of equity, laches, and want of jurisdiction in the court.

1. The ground upon which the plaintiff asks that the mortgage may be set aside and declared invalid is that it was made and authorized at a meeting of the shareholders held in the city of New York; that the corporation was not a corporation of the State of New York, but a corporation created by the statutes of Connecticut, Massachusetts, and Rhode Island, and the meeting ought to have been held in one or all of said States, and not in the State of New York, and therefore the meeting was illegal and all its acts and doings were null and void.

The bill sets forth that in December, 1865, there remained unbuilt of the company's line the portion between Waterbury, in the State of Connecticut, and Fishkill, in the State of New York, a distance of seventy-four miles, and also a portion in Connecticut, between Willimantic and Mechanicsville, a distance of twenty-six miles, and the company found itself unable, with its then means, to further complete its road; that on the fourteenth of March, 1866, the company resolved

to make a mortgage upon its road and property, and to issue bonds, to be secured by the mortgage, not to exceed the amount of twenty millions of dollars in all, for the purpose of retiring a then existing mortgage debt and prior liens upon its road and property amounting to $9,904,650, with accrued interest to that date, and to complete and equip its road.

In the mortgage itself, bearing date March 19, 1866, a copy of which is annexed to the bill, the corporation is described as "a corporation existing under the laws of the States of New York, Connecticut, Rhode Island, and Massachusetts."

It is recited that "the shareholders of the Boston, Hartford & Erie Railroad Company, at a meeting duly and lawfully
282 called and held at the city of New York, on the fourteenth day of March, A. D. 1866, voted to authorize the directors to make application to the several legislations of the States in which the chartered rights of the road exist for authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue, and dispose of, at the best rates that can be obtained, their convertible bonds, payable in the city of New York on the first day of July, A. D. 1900, for one thousand dollars each, not to exceed the amount of twenty millions of dollars in all, with authority to the directors to make a portion of the bonds payable in London;" "interest payable semi-annually on the first days of January and July in each year, at the rate of seven per cent. per annum; interest and principal to be payable at such places in the city of New York and in London as the directors may authorize; and the particular form of bonds, interest, warrants thereon, and mortgage to be left entirely at the discretion of the board of directors; the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road;" "that the board of directors, at a meeting duly convened and held in the city of New York on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first-mortgage bonds of said company, in the following form" (a form of the bond is here inserted); and that "the said directors, at their said meeting, further voted to empower bonds of said form * * * hereafter to be issued, and to be secured under the mortgage, * * * but not in a greater principal sum than twenty millions of dollars in all; * * * and further, at the same time, voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents."

283 It then proceeds to convey to the trustees named the railroad of the company, commencing at the foot of Summer street, in Boston, and thence extending through the States of Massachusetts, Connecticut, Rhode Island, and New York, to the western terminus of its location on the east bank of the Hudson river at Fishkill, together with all the privileges, franchises, and property then owned or thereafter to be acquired by the company.

By acts of the Legislatures of Rhode Island, Massachusetts, Connecticut, and New York, passed soon after the date of the mortgage,

the proceedings of the company in its execution were expressly ratified and confirmed, the same language being used in all the acts, as follows: "The proceedings of the Boston, Hartford & Erie Railroad Company, whereby, by indenture dated March 19, 1866, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed."

The bill further set forth that the Boston, Hartford & Erie Raid road Company was originally chartered by the Legislature of Connecticut, by an act passed at its May session in 1863, and that subsequently acts were passed by the Legislatures of Massachusetts and Rhode Island making the company a corporation of those States also; that in August, 1863, the Southern Midland Railroad Company, having previously acquired all the franchises and property of the Boston & New York Central Railroad Company, a corporation chartered under the laws of Massachusetts, Connecticut, and New York, conveyed all its franchises to the Boston, Hartford & Erie Railroad Company; and that in November, 1863, the company,
under authority given by the Legislatures of all the four
284 States, acquired the franchises of the Hartford, Providence &
Fishkill Railroad Company, a corporation chartered under the laws of New York, Rhode Island, and Connecticut.

It further appears that under an act of the Legislature of New York, passed April 25, 1864, entitled "An act to consolidate the Boston, Hartford & Erie, the Boston, Hartford & Erie Extension, and the Erie Ferry Extension Railroad Companies" (the two latter being New York corporations), the Boston, Hartford & Erie Railroad Company acquired the rights of charter and property of both the New York corporations, with the authority to have, hold, and use the same in its own name and right as a portion of its railway line and property, and all the rights which the corporations had to construct and operate a railway within the terminal points designated in their charters, subject to the laws of the State concerning railroad corporations.

It thus appears that the corporation was made up of several distinct corporations, chartered by the Legislatures of the different States, and all consolidated and merged into one corporation under the laws of all the States. It therefore became one of that class of corporations so numerous in this country owning a railroad extending through two or more States and chartered under the laws of each State. In such cases the corporation has a common stock, the same shareholders and officers, the same property, and a single organization, and is, for most purposes, one corporation. But it is a separate corporation in each State, so far that it is governed by the laws of each State within its own territory. Such a corporation is considered to have a domicil in each State and, in the absence of any statutory provision to the contrary, may hold its meetings and transact its corporate business in each. Bridge Co. *v.* Meyer, 31 Ohio St., 317; Pierce on Railroads, 20.

To show that this was not a New York corporation the
285 plaintiff relies upon Railroad Co. *v.* Harris, 12 Wall., 65. In that case it was decided that the Baltimore & Ohio Railroad Company, a Maryland corporation, having obtained from the Legislature of Virginia an act authorizing it to construct a railroad in that State did not thereby become a Virginia corporation, the court holding that the Virginia statute, under its peculiar terms, did not create a new corporation, but was a mere enabling act to permit the Maryland corporation to do business in Virginia. See also Railroad Co. *v.* Koontz, 103 U. S., 5. But the New York statutes concerning this corporation are of quite a different character. They are not mere enabling acts granting to a foreign corporation permission to transact its business within the State. They constitute it a New York corporation to the same extent as the legislation of Massachusetts, Connecticut, and Rhode Island make it a corporation in those States. If it is not a New York corporation it is not one in the other States, and has no domicil, and upon the plaintiff's theory of the law could not hold a meeting of its shareholders in either State, or, for that matter, anywhere else. It is clear that a meeting of the stockholders at which the mortgage was authorized was lawfully held in New York, and that its proceedings were valid and binding on the company.

To this it may be added that the confirmatory acts passed by the Legislatures of the four States at the request of the shareholders, and acquiesced in for fourteen years, would of themselves have been sufficient to cure the defect, if it had existed. Shaw *v.* Norfolk Co. R. R. Co., 5 Gray, 162; Howe *v.* Freeeman, 14 Gray, 566.

It is by no means clear if the company had not been a New York corporation and no confirmatory acts had been passed, that the proceedings of the meeting in New York would have been abso-
286 lutely void, and it is still more questionable whether, after negotiating this loan upon the faith of a mortgage which contained a recital that it was a New York corporation, either the corporation itself or its shareholders should be permitted to take advantage of the irregularity. But the conclusion already reached renders it unnecessary to consider these questions.

2. The bill further prays that if the court shall not, for the causes stated in the bill, declare the mortgage invalid, then, in the alternative, that the trusts under the mortgage may be established and confirmed; that the present trustees may be removed and new trustees be appointed to take possession of the mortgaged property and hold it, under the direction of the court, for the benefit of the shareholders and creditors, and that an account may be taken of the earnings of the road.

The mortgage contained provisions that in case of default by the company in the payment of either principal or interest of the mortgage bonds the company should deliver possession of the mortgaged premises to the trustees, and that, on taking possession, the trustees should file in the office of the secretaries of State of Massachusetts, Rhode Island, Connecticut, and New York a written notice that they had taken possession for default in the payment of the principal or

interest or both, as the same may be, and of their purpose to foreclose the mortgage for the default; that if the default should continue for the space of eighteen months after such notice filed the mortgaged premises should vest absolutely and in fee in the trustees, and the right of redemption of the company therein should be forever barred and foreclosed; that in case of an absolute foreclosure it should become the duty of the trustees to call a meeting of the bondholders, by an advertisement of the time, place, and the object thereof in newspapers published in Boston, Providence, Hartford, New York, and London, at which meeting the bondholders might organ-
287 ize themselves into a corporation under such corporate name as they might select, with a capital stock equal to the outstanding mortgage bonds, which new corporation should have all the powers, privileges, and franchises and be subject to all the duties, liabilities, and restrictions of the old company, and the trustees should thereupon convey to the new corporation all the mortgaged property and franchises.

The mortgage also contained provisions for the filling of vacancies in case of the death, resignation, or removal of any of the trustees, and for the vesting in the persons so appointed all the mortgaged property.

The following facts appear from the bill and a record of the supreme judicial court of Massachusetts for Suffolk county, a copy of which is made a part of the bill: On the 15th of July, 1870, George Ellis and others filed their bill of complaint in that court, sitting in equity, in behalf of themselves and all other holders of the mortgage bonds, representing that they were the owners of forty-seven of the bonds, and of the interest warrants thereon which had matured on the first days of January and July of that year and were unpaid, and praying for the appointment of a receiver and for the foreclosure of the mortgage. On the second of August, 1870, an order was entered in the cause appointing receivers and directing them to take possession of the road and property. On the ninth of May, 1871, a decree was entered in the cause, in which, after reciting that the court, on the 24th of April, 1871, had decided and decreed that Moses Kimball, Thomas Talbot, and Avery Plumer were, in law, the present trustees under the mortgage, it was adjudged and decreed by the court that the receivers deliver into the possession and control of these trustees or their successors in office all the roads, railways, property, and franchises which they had in their hands and possession or under their management and control as such receivers;
288 that the trustees or their successors in office, upon taking possession of the property, should file in the offices of the secretaries of State of the four States the notices authorized by the mortgage; and if default in the performance of the condition of the mortgage should continue for the space of eighteen months after the filing of such notices, the mortgaged property and franchises should vest absolutely and in fee in the trustees and their successors, and all right or equity of redemption of the company therein should be forever barred and foreclosed.

By a decree entered July 28, 1871, William T. Hart, George T. Oliphant, and Charles P. Clark were appointed by the court trustees

in place of Kimball, Talbot, and Plumer, who had resigned, and were declared their successors in the trust.

Under these decrees the trustees entered into possession of the mortgaged property, and on the sixteenth of September, 1871, filed in the offices of the secretaries of State of the four States the notices of foreclosure, and the default still continuing, maintained their possession for a period of more than eighteen months thereafter. On the 18th of March, 1873, they called a meeting of the bondholders, as authorized in the mortgage, for the purpose of organizing themselves into a corporation. At this meeting, held in Boston on the 17th of April, 1873, a corporation was formed, under the name of the New York & New England Railroad Company. By acts of the Legislatures of the several States, passed in May, 1873, the proceedings of the meeting were ratified and confirmed, and the new corporation has since been in possession of the road and franchises under a conveyance from the trustees authorized by these statutes.

The bill contains an averment that the Ellis suit has never proceeded to a final determination and decree, and is still pending in court.

The case thus presented shows that prior to the filing of this bill, under a decree of a court of equity having jurisdiction of
289 the parties and of the subject-matter, the mortgage had been completely foreclosed. To avoid the effect of the foreclosure, the bill charges that the Ellis suit was the result of a fraudulent conspiracy on the part of Ellis, the plaintiff, Lane, the president of the company, who represented it in its defence, and the receivers and trustees appointed by the court, entered into for the purpose of embarrassing the company and depriving it of its road and property; and that this fraud was perpetrated by submitting to the court false statements of facts for its decision, and thus obtaining a decree against the company. The bill does not allege in what particulars the statements of fact were false; nor does it allege that there was not a breach of the condition of the mortgage, nor that the plaintiffs were not the actual holders of the bonds and unpaid interest warrants, nor that any part of the interest which has accrued since 1869 has ever been paid; nor is there any offer or suggestion for redeeming the mortgage. There is no allegation that the new corporation, or any considerable number of the bondholders, had any knowledge of the alleged fraud. The obvious inquiry arises at this stage of the case, why the plaintiff has not brought to the attention of the State court the fraud alleged to have been practised upon it, and there sought to have the foreclosure decree revoked. It is well settled in the courts of the United States that when a decree or judgment has been obtained against a party to a suit at law or in equity by fraud or deception practised upon him by his opponent, and he has lost, without fault of his, his remedy of applying to the court for the revocation or reversal of the decree or judgment, a court of equity will afford him relief. U. S. *v.* Throckmorton, 98 U. S., 611; Metcalf *v.* Williams, 104 U. S., 93. In Nougué *v.* Clapp, 101 U. S., 551, it was held that the circuit court of the United States cannot revise or set aside a final decree

rendered by a State court, which had complete jurisdic-
290 tion of the parties and subject-matter upon the ground that the decree was obtained by fraud, where the injured party has had an opportunity to apply to the State court to reverse the decree. The plaintiff is a party to the foreclosure suit as a shareholder in the old corporation. The State court is still open to listen to the complaint of the corporation and its shareholders. The decree of foreclosure, though final in one sense, as determining the respective rights of the parties to the property in question, is still in its nature interlocutory, and is open to review by the court upon petition or motion in the cause or by bill or review for good cause shown. Story Eq. Pl., § 421 and note; Evans *v.* Bacon, 99 Mass., 213; Mass. P. S., ch. 151, § 12. The plaintiff has, therefore, an ample and complete remedy for all his alleged grievances in the State court, and there is no occasion for his application to this court for relief by bill in equity. The decree of foreclosure, therefore, now in full force and unrevoked, is a bar to this suit.

3. On the 21st of October, 1870, a petition in bankruptcy was filed against the corporation by one Adams, claiming to be a creditor, in the district court of the United States for this district, upon which petition the corporation was adjudicated a bankrupt, and assignees were chosen who are made defendants in this suit. After their appointment they conveyed to the new corporation all their interest in the mortgaged property. It is manifest that the right to all the relief which is prayed for in this bill passed to the assignees by force of the assignment from the district court, unless the effect of the adjudication in bankruptcy can be avoided upon the ground stated in the bill. This is admitted by the learned counsel for the plaintiff. The allegation is that the proceedings in the district court were fraudulent and collusive, and were a part of the conspiracy of
291 Ellis, Lane, and others to which the petitioning creditor also became a party to wreck the road, and that the petitioning creditor's debt was insufficient to give the court jurisdiction.

An adjudication of bankruptcy made by a district court having jurisdiction of the bankrupt cannot be impeached collaterally by any person who is a party to the bankruptcy proceedings. Until vacated in the manner prescribed by the bankrupt act it is binding upon all the parties to it. The district court is always open for a re-examination of its decrees in an appropriate form. Any order made in the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its revovation. The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the circuit court. By sec. 4986 of R. S. the circuit court is given general superintendence and jurisdiction of all cases and questions arising in the district court when sitting in bankruptcy, and upon bill, petition, or other process of any party aggrieved may hear and determine the case as in a court of equity. This jurisdiction is exclusive of all other courts, and is not reversible in the Supreme Court. Morgan *v.* Thornhill, 11 Wall., 65; Smith *v.* Mason, 14 *Id.*, 419; Sandusky *v.* National Bank, 23 *Id.*, 289;

New Lamp Chimney Co. *v.* Brass and Copper Co., 91 U. S., 656; Sanger *v.* Upton, 91 *Id.*, 56; Milner *v.* Meek, 95 *Id.*, 252; Sweat *v.* Railroad Co., 3 Cliff., 339. In New Lamp Chimney Co. *v.* Brass and Copper Co. the court say: "A decree adjudging a corporation bankrupt is in the nature of a proceeding *in rem* as respects the status of the corporation, and if the court rendering it has jurisdiction it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form or that due notice of the petition was never given."

292 No such defect appears in these proceedings. The district court had jurisdiction to make the decree, and it has never been vacated. The plaintiff and all the shareholders whom he represents form an integral part of the corporation, and, as such, were parties to the bankruptcy proceedings. He is, therefore, bound by the decree, and cannot impeach it collaterally in this suit.

4. Another defence is laches. This bill was filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings, nine years after the entry of the foreclosure decree in the Ellis suit, and seven years after the foreclosure became absolute and the road was conveyed to the new corporation by the trustees. During all this time the records of the courts upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated have been open to inspection and examination, and what has been done under them might have have been known to the plaintiff if he had seen fit to make inquiry. In the meantime it is apparent that many persons must have acquired rights in the stock of the new corporation who were ignorant of the alleged frauds. Under such circumstances to set aside this mortgage, to disregard the decree of foreclosure and the adjudication in bankruptcy, and to take this road out of the hands of the bondholders, who have received no interest on their bonds since 1869, and to place it in the hands of receivers for the benefit of the shareholders in the old corporation is a proposition so wild and preposterous as hardly to merit serious consideration.

5. The objection to the jurisdiction of the court remains to be considered. The bill alleges that the plaintiff is an alien, and resident of Inniskillen, in Ireland, and a subject of the Kingdom of Great Britain and Ireland. Three of the defendants are citizens of the State of New York. After the appearance in the cause of the

293 defendants who have filed demurrers Peter J. Kelly, a shareholder and a citizen of the State of New York, was admitted by the court, upon his own application, to come in as a party plaintiff, for the protection of his interests as a shareholder. The defendants contend that by admitting him as a party plaintiff the jurisdiction of the court was ousted. Assuming that the joinder as coplaintiffs of an alien and a citizen of the same State with some of the defendants would be fatal to the jurisdiction, the answer to the objection is that, jurisdiction once having attached, it could not be defeated by the action of the court without the consent or concurrence of the plaintiff. The plaintiff, as an alien, being personally qualified to bring the suit, the jurisdiction is not defeated by the fact that the

parties whom he represents may be disqualified. Coal Co. *v.* Blatchford, 11 Wall., 172. The admission of Kelly by leave of court did not, in a jurisdictional sense, make him a plaintiff. He acquired thereby no control over the suit; Graham still remains the real plaintiff and *dominus litis*, and the suit must stand or fall on the case which he makes. Perhaps the court erred in admitting Kelly as a party; but that should not prejudice Graham, as it was not done at his instance.

As the court is of opinion, for the reasons already stated, that the demurrer for want of equity and for laches must be sustained, it becomes unnecessary to consider many other objections to the bill raised by the demurrers which were argued by counsel.

Demurrer for want of jurisdiction overruled; demurrer for want of equity and laches sustained.

B. F. Butler and R. A. Pryor, for plaintiff.
W. G. Russell and J. L. Thorndike, for N. Y. & N. E. R. Co.
J. C. Gray and W. C. Loring, for assignees of B., H. & E. R. Co.
C. M. Reed, for executrix of Mark Healey.

294 *Bond to Party on Appeal.*

Know all men by these presents that we, John Rooney, of the city, county, and State of New York, as principal, and John Conlon and Michael H. Keenan, both of Boston, in the State of Massachusetts, as sureties, are held and firmly bound unto the defendants in a certain cause hereinafter named jointly and unto each of said defendants severally in the full and just sum of one thousand dollars, to be paid to the said defendants jointly and severally, and to their and each of their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twentieth day of February, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a circuit court of the United States holden at Boston, within and for the district of Massachusetts, in the first circuit, in a case in equity depending in said court between William F. Graham and other complainants and The Boston, Hartford and Erie Railroad Company, Marianne W. Healy and Emily W. Healy, executrices of Mark Healy; The New York and New England Railroad Company, and William T. Hart and Charles P. Clark and others, defendants, decree was rendered against the said William F. Graham and others, complainants; and the said William F. Graham and Amelia Teresa Raymond, two of said complainants, having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said William F. Graham and Amelia Teresa Raymond shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN ROONEY. [L. S.]
JNO. CONLON. [L. S.]
MICHAEL H. KEENAN. [L. S.]

Approved.

THOMAS L. NELSON,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district or Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

295. UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause in equity, entitled William F. Graham *et al.*, complainants, *v.* Boston, Hartford & Erie Railroad Company *et al.*, defendants, in said circuit court determined, including the opinion of the court in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred & seventh.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

Endorsed on cover: Massachusetts C. C. U. S. No. 232. William F. Graham and Amelia Teresa Raymond, appellants, *vs.* The Boston, Hartford and Erie Railroad Company *et al.* Filed 1st June, 1883.

118-161

MAR 30 1886
JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 232.

WILLIAM F. GRAHAM and AMELIA TERESA RAYMOND
Appellants.

v.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, *et al.*,
Appellees.

Appeal from a judgment of the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE APPELLANTS.

ROGER A. PRYOR,
Of Counsel for the Appellants.

1886.
C. B. Merwin, Stationer and Printer, 218 Fulton St., N. Y.

Now the condition of the above obligation is such that if the said William F. Graham and Amelia Teresa Raymond shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

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JNO. CONLON. [L. S.]
MICHAEL H. KEENAN. [L. S.]

Approved.

THOMAS L. NELSON,
District Judge.

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No. 232.

WILLIAM F. GRAHAM, and AMELIA TERESA RAYMOND,
Appellants,

vs.

The Boston, Hartford & Erie Railroad Comp'y; Robert H. Berdell, John C. Bancroft Davis, Henry N. Farwell, Thomas Talbot, Moses Kimball, Avery Plumer, William T. Hart, Charles P. Clark, Frederick A. Lane, George Ellis, W. C. Eayrs, The New York and New England Railroad Company; and Charles S. Bradley, Charles R. Chapman, and George M. Barnard, Assignees in Bankruptcy; and Charles Endicott and Daniel A. Gleason, Treasurer and Receiver General; and Charles E. Gregory, David H. Gregory, and Dudley S. Gregory, 3rd, Executors; and Emily W. Healey, and Mary Ann W. Healey, Executrixes; and Robert Olyphant, Executor; and John Doe and Richard Doe, Executors,
Appellees.

Appeal from the judgment of the Circuit Court of the United States for the District of Massachusetts.

Brief for the Appellant.

STATEMENT OF THE CASE.

It appears from the bill that the suit below was brought by certain stockholders of the Boston, Hartford and Erie Railroad Company, to set aside, as fraudulent and void, a certain mortgage of the franchises and property of the said railroad, known as the "Berdell mortgage." The prayer of the bill is, *inter alia*, that the mortgage may be set aside, for an injunction, a discovery and an accounting. The facts, as alleged, are these: The Boston, Hartford and Erie Railroad Company was chartered by act of the Legislature of Connecticut in May, 1863. It was subsequently made a body corporate in Massachusetts and Rhode Island, by acts of the Legislatures of those states. It acquired by purchase the property and franchises of various railway corporations in these several states, and in the state of New York, pursuant to the purpose for which it had been chartered—namely to make and operate a line of railway from Boston and Providence, in a generally westward direction, through the states of Massachusetts, Connecticut, Rhode Island and New York, to Fishkill on the Hudson River in New York, there to connect with, and form an eastern feeder for the Erie Railway Company, (pp. 3-7 inclusive of the Record). There were liens upon the property and franchises of the several railway companies, purchased by the Boston, Hartford and Erie Railroad Company, amounting in the aggregate to nearly $10,000,000, ($9,904,650, with accrued interest to be added—p. 7 of the Record.) In this condition of things, while something near one hundred miles of the

intended road remained unbuilt, (p. 7 of the Record), the company not being possessed of the money necessary to complete and equip the road as the charter required, certain persons, named in the bill, who were stockholders, or officers, in the Erie Railway Company, and at the same time stockholders, or officers, in the Boston, Hartford and Erie Railroad Company, conspiring in the interest of the Erie Railway, and for their own private and personal gain, to wreck the said Boston, Hartford and Erie R. R. Co., and to convert its property to their own use, procured a meeting of the stockholders of the Boston, Hartford & Erie R. R. Co., to be called to meet in the city of New York, at the office of the Erie Railway Co. [p. 10 of the Record], on the 14th day of March, 1866. At this pretended meeting of stockholders it is claimed that the directors were authorized to apply to the legislatures of the several states in which the chartered rights of this road exist, for authority to make a mortgage to certain trustees, of the property and franchises of the company, to secure the payment of bonds to the amount of $20,000,000. Of this amount of money, so to be raised, $10,000,000, or thereabouts, was to be held in trust, to pay off the underlying liens, and the remainder used to build and equip the road. [pp. 8 and 41 of the Record] Acting solely upon this authority, without any other warrant of right, and without any pretense of application for legislative authority, the directors, on March 19, 1866, five days after the pretended stockholders' meeting, authorized the creation and issue of twenty thousand bonds, of one thousand dollars each, and the officers of the company immediately prepared and issued all of these twenty thousand bonds, and executed and delivered the mortgage, or deed of trust, to three trustees, [pp. 8, 9 of the Record] Robert H. Berdell, John C. Bancroft Davis and Dudley S. Gregory. These trustees immediately accepted the trust, and entered upon the discharge of their duties thereunder. [p. 11 of the

Record.] One of these trustees, Robert H. Berdell, was, at this time, president of the Erie Railway Company. In less than a year Mr. Berdell resigned his position as trustee, without order or authority of any court, and without rendering any account of his doings as trustee to any court, or legislature, or body of stockholders or directors, [p. 11 of the Record] and was paid $10,000 out of the trust fund for so doing. [p. 25 of the Record] Some six months after Mr. Berdell's resignation, the remaining trustees appointed John S. Eldredge trustee in his place, Mr. Eldredge being at that time the president, and a director, in both the Erie Railway Company and the Boston, Hartford and Erie Railroad Company. Then presently the two remaining original trustees, Davis and Gregory, resigned, [p. 12 of the Record] without order or authority from any court, and without making any report of their doings as trustees, and were paid each $15,000 for so doing. [p. 26 of the Record] Mr. Eldredge was for a time sole trustee, then he appointed two co-trustees, and himself resigned, in like manner as the other trustees had resigned. [pp. 12, 13 of the Record] And so trustees were appointed, and served for a time, and then resigned in like manner as the other trustees had resigned, and new trustees were appointed in their place, one after another, until twelve persons had in turn been appointed and served in that capacity (Exhibit C, p. 54 in the Record) between March 19, 1866, and July 19, 1871. But, with various associates or co-trustees, Mr. Eldredge, the president of both the Erie Railway Company and the Boston, Hartford and Erie Railroad Company, was a trustee under this mortgage from October 28, 1867 to March 16, 1870. It is charged in the bill that the greater part of the money realized from the sale of these bonds was converted by the trustees to their own use, and was not expended in the construction or improvement of the road, (p. 16 of the

Record) and that more than two millions five hundred thousand dollars of the original indebtedness of the road remains still due and unpaid. (p. 16 of the Record.)

At this stage of the case, in July, 1870, Mr. Frederick A. Lane, the general counsel and a director in the Erie Railway Company, through and in the name of his clerk, one George Ellis, brought a suit in Equity for the foreclosure of the mortgage, in the Supreme Judicial Court of Massachusetts, against the road, charging default in the payment of interest on the bonds, and asking for a receiver. (p. 17 of the Record)

In August following three receivers were appointed, and took possession of the road. (p. 18 of the Record) Mr. Lane subsequently became president of the Erie Railway, succeeding Mr. Eldredge, and in that condition of things, became *dominus litis* in this suit in the Supreme Judicial Court of Massachusetts, which we speak of as the "Ellis suit." Mr. Ellis was not a *bona fide* holder of any bonds, and acted merely as Mr. Lane's tool. Finally, upon an agreed statement of facts, and without argument, the cause was pretended to be submitted to the court, and on April 24, 1871, a decretal order was made, declaring the trustees for the time being under the Berdell Mortgage entitled to the property of the road, upon certain conditions, and upon paying certain sums to the receivers previously appointed. (p. 20 of the Record)

Similar suits, with similar results were, brought by Ellis in the Superior Court of Connecticut, and in the Supreme Courts of Rhode Island and New York, (pp. 20, 21 of the Record) except that the suit in New York was discontinued by consent of all parties, January 16, 1871. (p. 21 of the Record)

On August 15, 1871, the property was accordingly turned over to the trustees of the Berdell mortgage.

In this way, then, omitting here the details which are fully set out in the bill (pp. 17–21), the Berdell mortgage is pretended to have been foreclosed. It was maintained by the complainants below that this whole proceeding, from beginning to end, from the moment the mortgage was conceived until it was foreclosed, was collusive and iniquitous and fraudulent and void, and it is so charged in the bill.

In October, 1870, one Adams, acting for and under the direction of Frederick A. Lane, then president of the Boston, Hartford and Erie Railroad Company, while the Ellis suit was pending, petitioned the District Court of the United States for the District of Massachusetts, to declare the road a bankrupt. This proceeding, as it is particularly set out in the bill, (Schedule A, at page 28) was prosecuted by Lane through Adams, and defended by Lane as president. Lane was therefore here again, as in the Ellis suit, *dominus litis*. Adams was not a creditor *bona fide*, and it is charged that the proceeding is bankruptcy was therefore collusive, and in contempt of court. As a result of these proceedings, conducted as described in the bill, (Schedule A, at page 28), a decree of bankruptcy was entered by consent on March 9, 1871.

Acting under the authority pretended to be derived from the mortgage [§10, p. 49 of the Record], the trustees, having given the required notice, [pp. 22 and 33 of the Record], called a meeting of the bondholders in Boston, and proceeded to organize the New York and New England Railroad Company as legal successor to the property and franchises of the Boston, Hartford and Erie Railroad Company. By this pro-

ceeding the property was divested from the trustees and vested in the New York and New England Railroad Company, *ipso facto*, [pp. 33 to 37 of the Record], the trustees under the pretended mortgage, however, becoming directors in the new company.

To the complainant's bill in the court below certain of the respondents demurred, and, the cause having been duly argued on the amended bill and the demurrer before Mr. Justice Nelson, in an opinion filed January 18, 1883, the learned judge sustained the demurrer upon the ground of want of equity and laches.

Whereupon the complainants below appealed to this Court.

ASSIGNMENT OF ERRORS.

The Circuit Court erred :—

1. In that it held the Boston, Hartford and Erie Railroad Company a New York corporation.

2. In that it held the pretended meeting of the shareholders of the Boston, Hartford and Erie Railroad Company on March 14, 1866, in the city of New York, lawful and regular, and the proceedings at that meeting valid and binding on the Company.

3. In that it held the mortgage of March 19, 1866, known as "the Berdell mortgage," valid and binding on the Company.

4. In that it held the proceedings and decree in the Ellis suit in the Supreme Judicial Court of Massachusetts, valid and regular and binding upon these appellants, and the decree in foreclosure therein a bar to this suit.

5. In that it held the proceedings and decree in bankruptcy in the District Court of Massachusetts, valid and regular and binding upon these appellants, and the decree therein a bar to this suit.

6. In that it denied to the appellants the right to attack these two adjudications in this suit.

7. In that it held the appellants barred by laches.

8. In that, in deciding that the foreclosure suit and the bankruptcy proceedings were regular and valid, and the decrees therein binding on these appellants in consequence of such regularity and validity, it decided, in reality, a question of fact, and not a question of law, and, in consequence, a question not proper to be passed upon on demurrer.

9. In that it held these appellants not entitled to any relief.

Argument.

I. In that it held the Boston, Hartford & Erie Railroad Company a New York corporation.

If the Court please:—

The Boston Hartford & Erie Railroad Company, as it appears in the Record (page 3), is a corporation lawfully constituted by Act of the Legislature of Connecticut (5 Private Laws of Connecticut, page 543), passed at its May session A.D 1863. The preamble to this act is in these words: "Whereas, by grants "heretofore made to sundry railroad corporations, this

"State has declared her desire and policy to be that "railroad communication shall be opened through the "central portion of this state, extending to and con- "necting with the Erie Railroad at Fishkill on the "west, and the harbor of Boston and the city of Prov- "idence on the east; and whereas there still remains "some portions of said line to be constructed, which "unbuilt portions the present grantees of power to build " have been unable to finish; and whereas there is "cause to believe that under one corporation said line "can be completed, and so answer the end and purpose "of the creation of said several corporations; there- "fore, resolved," etc., etc.

In section first, following, the specified incorporators are "constituted a body corporate and politic by the name of the Boston, Hartford & Erie Railroad Company."

In the second section the capital stock is fixed at fifteen millions of dollars.

Section third regulates the nature and manner of subscription to the stock.

Section fourth is as follows:

"Said Boston, Hartford & Erie Railroad Company "may purchase, upon such terms and conditions as may "be mutually agreed upon by the several corporations "interested, at meetings of said several corporations leg- "ally called for such purpose, the franchise, the whole "or any part of the railway, or railway property, of any "railroad company located, in whole or in part, in this "state, whose line, or a portion of whose line of railway, "constructed or chartered, now forms part of a railway "line from the harbor of Boston, passing through "Thompson to Willimantic, and from Providence, "through Willimantic, to Hartford, Waterbury, and "thence toward the North River, with the purpose of

"reaching a point at or near Fishkill, in the state of "New York."

The act then proceeds to bind the new company, in case it purchased these franchises and this property, to complete the line of the road, to run trains, etc., etc., upon certain terms and conditions.

From a consideration of the terms of this enactment it is plain that the legislature did not intend thereby to consolidate several old corporations in such a way as to create a new body politic out of the old, nor to merge the existence of the smaller ones in a larger one, but to create an entirely new and distinct corporation with the power to buy or build a line of railway from Boston and Providence to the North River. The Boston, Hartford & Erie Railroad Company was, therefore, a new and independent creation, as distinct and separate, as respects its corporate existence and power, as though it had been the only corporation ever created in Connecticut, and as though no mile of railroad had ever been built in the state. It was a Connecticut corporation, pure and simple, with such power only as the legislature of Connecticut had conferred upon it.

Now, under these powers so conferred, it appears (Record, pp. 4–7) that this corporation did, immediately after its creation, acquire by purchase the franchises and property of sundry moribund corporations in Connecticut, Rhode Island, Massachusetts and New York, and did, as its charter had contemplated, having in a lawful and regular manner become possessed of these franchises and this property, proceed to construct and operate the intended line of road.

As touching the status of this corporation in the state of New York, it is important to notice that among the properties and franchises acquired by this company, were the following:—

1. Southern Midland Railroad Company.
2. Hartford, Providence and Fishkill Railroad Company.
3. Boston, Hartford and Erie Extension Railroad Company.
   Boston, Hartford and Erie Ferry Extension Railroad Company.

The Southern Midland Railroad Company was a corporation which had succeeded to, and acquired the franchises and property of the Boston and New York Central Railroad Company, which was a corporation that had been chartered under the laws of Massachusetts, Connecticut and New York.

The Hartford, Providence and Fishkill Railroad Company was a corporation chartered under the laws of New York, Rhode Island and Connecticut.

The Boston, Hartford and Erie Extension Railroad Company and the Boston, Hartford and Erie Ferry Extension Railroad Company were corporations chartered under the laws of New York.

With respect to the purchase of the franchises and property of the Southern Midland Railroad Company, it need not be argued that such purchase in no way operated to constitute the Boston, Hartford & Erie Railroad Company a New York corporation, because the Southern Midland Railroad Company was not a New York corporation; there was, in consequence, no act of the legislature of New York recognizing, or validating or confirming the sale; it had no property in the state of New York, and it had absolutely nothing to convey, either in its own right or in its right as successor to the Boston and New York Central Railroad Company, except its property and franchises outside of the state of New York. There is therefore no room for serious contention, that this transaction

in any way operated to make the Boston, Hartford any Erie Railroad Company a New York corporation, and we submit that the learned judge in the court below, erred in assigning to this transaction any weight when considering the question of the status of this corporation in New York.

And again, with respect to the purchase by the Boston, Hartford & Erie Railroad Company, of the property and franchises of the Hartford, Providence and Fishkill Railroad Company, to which the court below calls attention, as evidence that this company should be regarded as a New York corporation, it may be remarked, as in the case of the Southern Midland Railroad Company, that the said Hartford, Providence and Fishkill Railroad Company owned no property in the state of New York, had nothing in that state to convey, and that there never was any act of the legislature of New York, recognizing, or validating or confirming the sale.

But, further and most materially, with respect to both these acquisitions on the part of the Boston, Hartford and Erie R. R. Co., it is remarked that, by a bargain and sale, it is not, in any wise, within the power of either buyer or seller, to confer, or create corporate existence.

Rorer on Railways, 79, and cases collected.

It is not important, so far as the question in hand is concerned, whether one or both of these corporations were, or were not, New York corporations. Whatever they may have been, and whatever the terms of sale, the purchase of one or both of them, by the Boston, Hartford and Erie R. R. Co., could have had no tendency to create a corporate existence in New York. It is not within the power of any New York corporation to sell itself, so that, *ipso facto*, the

purchaser shall become a New York corporation. If it were, then corporations might be created in New York by bargain and sale, or by the forclosure of a mortgage—a proposition which this Court will not hear argued.

Rorer on Railways, 79, and cases collected.

This matter resolves itself then into this elementary proposition. If the Boston, Hartford and Erie R. R. Co., is a New York corporation, it is such a corporation by virtue of an express and unequivocal act of the legislature of that state. Corporate existence in the state of New York can be acquired by a railroad company in no other way than by such an act.

In the United States the power to confer corporate franchises is vested exclusively in the legislatures of the several states, and, as to the territories, and for the purposes of the Federal Government, in Congress.

Morawetz on Corp. §4, and cases cited;
Franklin Bridge Co, v. Wood, 14 Ga. 80;
Penn. R. R. Co. v. Canal Co., 21 Penn. St., 9.

A railroad corporation cannot be created by implication.

Tenn. R. R. Co. v. Adams, 3 Head., 596;
Penn. R. R. Co. v. Canal Co., 21 Penn. St., 9;
Wright v. Briggs, 2 Hill, 77;
Camden, etc., R. R. Co. v. Briggs, 29, N. J. Law. 623.

This is well expressed by Black, C. J., in his opinion in the case of Pennsylvania Railroad Company v. Canal Company, *supra*. In that case the question was

whether the Pennsylvania Railroad Company had a right, either under its charter or by any other law, to carry freight and passengers on a road known as the Columbia road. In deciding against the right the Court said:—

"It may be that the privilege which the relators "claim might arise by implication out of their charter, "or some other of the acts cited by their counsel, if "we were at liberty to give to them the broad construc- "tion that we sometimes apply to other laws of a dif- "ferent character. But corporate powers can never be "created by implication nor extended by construction. "No privilege is granted unless it be expressed in plain "and unequivocal words, testifying the intention of "the Legislature in a manner too plain to be misun- "derstood. When the state means to clothe a corpo- "rate body with a portion of her own sovereignty, "and to disarm herself to that extent of the powers "which belong to her, it is so easy to say so "that we will never believe it to be meant when it "is not said, and words of equivocal import "are so easily inserted by mistake or fraud, that every "consideration of justice and policy requires that they "should be treated as nugatory when they do find their "way into the enactments of the legislature. In the "construction of a charter to be in doubt is to be re- "solved, and every resolution which springs from doubt "is against the corporation. This is the rule sustained "by all the courts in this country and in England. No "other has ever received the sanction of any authority "to which we owe much deference. This court has asser- "ted it times without number. We have ruled five or "six important cases upon it within the last year. We "seem not to have made much impression on the pro- "fessional mind, and we are probably making as little "now. But when respectable counsel call on us here- "after, as they doubtless will, to enlarge corporate "powers by construction, we can only repeat, again and

"again, that our duty imperatively forbids it. The "privileges of the Pennsylvania Railroad Company may "be too rigidly restricted. If the usefulness of the "company would be increased by extending them, let "the legislature see to it, but let it be remembered that "nothing but plain English words will do it."

It is, moreover, not within the power of a court of the United States to create a corporation, nor is an act of the legislature, granting or refusing, such a franchise, open to review in such a court.

Trust Company v. Brady, 20 Barb. 119.

Unless, therefore, the Boston, Hartford & Erie Railroad Company be a corporation, chartered and incorporated by an act of the legislature of the state of New York, constituting it a body corporate in plain and unequivocal words, it has no corporate existence in that state.

Wood on Railways, § 6;
Morawetz on Corp., § 10.

The only legislative act under which there is any pretence that this company is a New York corporation was passed by the legislature of the state of New York April 25th, 1864, and is entitled "An act to consolidate the Boston, Hartford and Erie, the Boston, Hartford and Erie Extension, and the Boston, Hartford and Erie Ferry Extension Railroad Company." It is an act authorizing the Boston, Hartford and Erie Extension and the Boston, Hartford and Erie Ferry Extension Railroad—two New York corporations, "to sell "and convey to the Boston, Hartford and Erie Rail "Road Company"—a Connecticut corporation, "the "franchises and property of said several corporations "upon such terms as may be mutually agreed upon." It

then proceeds to disclare that, when the sale shall have been made and proper certification of it made to the state authorities, "the said Boston, Hartford and Erie "Rail Road Company shall become possessed of the "rights of charter and property, sold, conveyed and "and described in said certificates, and may have, hold "and use the same in their own name and right, as a "portion of their railway line and property, and have "all the rights the corporation making sale and con- "veyance had at the time of such conveyance" [not, be it observed, to become, *ipso facto*, a New York corporation, as the successor of the two corporations that were selling out, but] "*to construct* "*and operate a railway* within the terminal points desig- "nated in the charter of the company making the "conveyance, and subject to the laws of this state, pass- "ed or that may be passed, concerning railroad corporations."

Now, what, precisely, was the legal force and effect of this transaction and this enactment? What was it more than this? A Connecticut railway corporation, authorized by its charter to construct and operate a railroad from Boston and Providence to the Hudson river, and particularly empowered to acquire and hold railroad property outide of the state of Connecticut, provided it was in the line of its proposed road, having brought its track up to the line of the state of New York, buys from two New York companies a short line of track and a ferry franchise, in order to complete its line to the Hudson River, and, to the end that there may be a valid transfer of the property, and to enable the New York companies to convey—a thing they could not do without legislative sanction—the act of April 25th, 1864, was procured to be passed.

This enactment provides for, and contemplates two things only:—(1) It authorizes the two New York companies to sell out, and the Connecticut corpora-

tion to buy—that is to say, it sanctions and confirms the conveyance, and makes what was before the act impossible, a lawful and valid transaction; and (2), it licenses the Connecticut purchaser to use and hold and enjoy its purchase in the state of New York, subject to the laws of that state.

Wood on Railways, § 486.

There is no single word in the act from which, by the loosest construction, we may imply or infer an exercise of sovereignty in conferring corporate franchises. "May sell and convey," "shall become possessed," "may have, hold, and use." Are these the words by which corporations are in general created? They are the only enabling words in this act. Is this instrument a type of the charters granted by the Commonwealth of New York to railway companies? If it is in the usual form, perhaps something may be presumed in favor of its effect; but if it is an unusual way of conferring a franchise, nothing is to be assumed, but it must be construed strictly. Is it not idle to maintain that this act is anything more than a permission to sell as toward the two New York companies, and a permission to buy and use as toward the Connecticut company.

Inasmuch as the words of the act do not expressly and unequivocally confer upon the Boston, Hartford & Erie Railroad Company corporate existence in New York, and since nothing can pass by implication in such a case, it is our contention that this railroad has no corporate existence in New York.

It is familiar learning that a single corporation may be created by the concurrent action of two or more states, for the construction and maintenance of a railroad, and that an entirely new corporation may be created in such a way, out of two or more corporations already existing; and that a new corporation may be created in one state where one of the

corporation so united and uniting is a foreign one, and in such a way that the new corporation will be a distinct corporation in each state; and that a corporation originally incorporated in one state may, for a sufficient reason, be incorporated in another state, in such a way as to make it a corporation of such latter state.

Wood on Railways, §14, and cases cited.

But it is plain that none of these things were done or attempted, in the case at bar. There is no new corporation created by the concurrent acts of the legislatures of New York and Connecticut, and while the act of the New York legislature is entitled "An act *to consolidate*," etc., it is evident that there was no purpose, or attempt, to effect such a consolidation of these three companies, as to merge them all into a new organization, composed of all but identical with none. There is no creation of any new corporation whatever. The New York companies sell out and by the conveyance extinguish themselves, but the purchaser of their property and franchises remains, survives and subsists. The Boston, Hartford and Erie Railroad Company is just what it was before the purchase of these properties, a Connecticut corporation with power to own and operate its road from Boston to the North River, and granted certain franchises and privileges at its western terminus in the state of New York by the legislature thereof. It was not within the power of the legislature of New York, by any act to impair, or modify, or extinguish the corporate existence of this railway in Connecticut, andsuffering it to acquire property in New York did not affect its corporate existence. The act of April 25th, 1864, left the road just where it found it, but it merged the existence of the two New York companies in the Connecticut company.

The New York legislature, having created these two

New York corporations, had clearly the power, in a proper case, to authorize them to sell their property and franchises to a foreign corporation, and it likewise had the right to license such foreign corporation to acquire and take title to the property, and to use and enjoy it in a lawful manner. This we submit was the intent and effect of the act of April 25th, 1884. This is absolutely all that it assumes upon its face to do, and all that a fair construction of the language of the act will warrant. If it shall be held that this act was sufficient and effectual to make this railway company a New York corporation, then we have established the rule that, when a corporation created by one state buys property and franchises in another state, with legislative sanction, and takes possession of them, it thereby, and *ipso facto*, becomes at once a corporation of that state—a body corporate created by a chattel mortgage or a bill of sale.

"Where a railroad corporation," says Mr. Wood, in his recent treatise on the Law of Railways, "is created "by the laws of one State, with authority to construct "a railroad within its borders, and into or through "another State, while the act creating the corporation "is operative to give it vitality and corporate power, "yet it does not of course, give it any authority to take "lands, etc, in such other State for the construction of "its road, yet if such other State recognizes it as a cor- "poration, and to further its objects, confers upon it the "necessary authority to take lands, etc., for the con- "struction of its road, without attempting to reincorpor- "ate it in such State *it does not thereby become a new cor- "poration in such State, but is a domestic corporation in "the State creating it, and a foreign corporation in the "other State which has not endowed it with corpor- "ate life, but merely conferred upon it authority to "exercise its corporate functions with which it was previ- "ously invested, within its jurisdiction.* * * * The

"action of the State in such cases may be said to "amount merely to a license to such foreign corpora- "tion to take property for its corporate purposes, and "to exercise its corporate functions within the State. * * * That one State may permit a corporation created "in another State, or country, to exercise its functions "therein, and may impose certain restrictions as a con- "dition precedent thereto, is well settled. But such "corporation, by accepting such conditions, does not "become a new corporation in such State, but remains "a domestic corporation of the State creating it, "and a foreign corporation in the State under whose "license it acts."

Wood on Railways, § 14, pp. 34-35.
State v. Railway Companies, 30 N. J. Law. 473.

Upon turning to the reports we find authority for our construction of the Act of April 25, 1864, in the case of Railroad Company v. Harris, 12 Wall, 65. This was a case where the Baltimore and Ohio R. R. Co.—a Maryland railroad corporation—whose charter contemplated the extension of the road beyond the limits of the state of Maryland, was allowed, by an act of the legislature of Virginia, to continue its road through that state, and by act of Congress, to extend into the District of Columbia, and in which the Supreme Court of the United States, speaking by Mr. Justice Swayne, held that, although in both the Virginia act and in the act of Congress, the entire Maryland charter was set out in the preambles, no new corporations were created, either in Virginia or the District, but merely that the old corporation was empowered thereby to exercise its corporate functions in them by their permission.

Let us consider this case. It appears that the Baltimore and Ohio R. R. Co., was incorporated by an act

of the legislature of Maryland, on February 28, 1827, and that, on the 8th of March following, the legislature of Virginia passed an act, whereby, after reciting in full the Maryland act, it was declared, "that the "same rights and privileges shall be, and are hereby "granted to the aforesaid company within the territory "of Virginia, and the said company, shall be subject to "the same pains, penalties and obligations as are im- "posed by said act, and the same rights, privileges and "immunities, which are reserved to the state of Mary- "land, or to the citizens thereof, are hereby reserved to "the state of Virginia and her citizens."

On the 20th of March, 1831, Congress passed an Act which, after reciting by a preamble the original act of incorporation, enacts, "that the Baltimore and Ohio "Railroad Company, incorporated by the said Act of "the General Assembly of the state of Maryland, shall "be, and they are hereby authorized to extend into and "within the District of Columbia a lateral road. "* * * And the said Baltimore and Ohio "Railroad Company are hereby authorized to exercise "the same powers, rights and privileges, and shall "be subject to the same restrictions, in the con- "struction and extension of the said lateral road "within the said District, as they may exercise or be "subject to, under, or by virtue of the said act of incor- "poration in the extension and construction of any rail- "road within the state of Maryland; and shall be- "entitled to the same rights, benefits and immunities in "the use of said road, and in regard thereto, as are pro- "vided in the said charter, except the right to construct "any lateral road, or roads, in said district from said "lateral road."

The case was argued, and reargued, to the Court, and counsel for the railroad, admitting that the Act of Congress was only an enabling act, insisted that the Act of

Virginia was different, and that it created a new corporation.

Speaking to this point the Court said:—

"As regards the point under consideration, we find "no substantial difference. In both the original Mary- "land act of incorporation is referred to, but *neither*, "*expressly or by implication, create a new corporation.* The "company was chartered to construct a road in Vir- "ginia as well as in Maryland. The latter could not "be done without the consent of Virginia. That con- "sent was given upon the terms which she thought "proper to prescribe. With a few exceptions, not ma- "terial to the question before us, they were the same as "to powers, privileges, obligations, restrictions and lia- "bilities, as those contained in the original charter. "The permission was broad and comprehensive in its "scope, *but it was a license and nothing more.* It was "given to the Maryland corporation as such, and that "body was the same in all its elements, and in its "identity afterwards as before. In its name, locality, "capital stock, the election and power of its officers, in "the mode of declaring dividends and doing all its bus- "iness, its identity was unchanged ; only the sphere of "its operations was enlarged."

This seems to mean, if the Court please, that, because these Acts of Congress and the legislature of Virginia "neither expressly or by implication create a new corporation," they are to be construed as licenses and nothing more.

This, we submit, is our case; because the Act of April 25, 1864, of the legislature of New York neither expressly nor by implication creates a new corporation, we urge that it must be construed—as these acts of Congress and of Virginia were construed—as a mere license. Our case, moreover, while "on all fours" with the case of Railroad Company v. Harris, *supra*, is, as to this point, a much stronger one. In the case of Harris

it appears that the matter of incorporation was brought to the legislative mind upon the passage of the act referred to. The charter is recited at length, and its provisions specified and considered. In each of the acts this is equally the case. The matter of the charter being plainly before the legislature, the very words of it written in their acts, and the several provisions of it being specified and detailed,it is clear that the question of incorporation could not but have been in the minds of the members of those legislatures in passing the acts in question. Because a new corporation is not created by express words, or by some necessary implication, the Court declined to construe the acts as anything more than a permission. But in our case there is not so much as the remotest hint that the legislature of New York, in passing the Act of April 25, 1864, had even a passing thought of incorporation, or charters, or of the creation of new franchises and corporate existence. The act says not a word about any charter, or any act of incorporation, except the rights of charter of the companies making the conveyance.

Those rights of charter were passed over to the Connecticut corporation, by what the act itself speaks of as a "conveyance". Ten times within the space of thirty lines in this enactment what is proposed to be enacted is spoken of as a "conveyance". There is nothing but conveyance and permission in it. The charter of the Boston, Hartford and Erie R. R. Co. is never mentioned or alluded to. Now nothing in the law is more clear than the proposition that the legislature of New York could not create a new corporation without knowing it, or without meaning to, or without ever thinking about it.

There is nothing in the act from which it is fair to infer that that legislature knew they were creating a new corporation by the act, or meant to create a new corporation, or ever even thought of the possibility of creating thereby a new body corporate,

Let the idea that any such thing was accomplished by this act be dismissed.

Railway Co. v. Whitton, 13 Wall, 270, 284;
Hart v. Boston, Hartford & Erie R. R. Co., 40 Conn., 524;
City of Covington v. Bridge Co., 10 Bush, 69;
Baltimore R. R. Co. v. Cary, 28 Ohio St. 208;
Erie Ry. Co. v. Stringer, 32 id. 468;
State v. Railroad Co., 30 New Jersey Law, 473;
Pierce on Railways, 17.

In the court below the case of the Covington, etc. Bridge Co., v. Mayer seems to have been relied on as authority for the position taken as to the status of this company in New York.

It is reported in 31 Ohio St. at page 317. Upon turning to the book, however, it is found that this is a case where a Kentucky corporation had been expressly re-incorporated in Ohio. It appears that the Covington and Cincinnati Bridge Company was a body corporate, originally incorporated by the legislature of Kentucky for the purpose of erecting and maintaining a bridge at Covington across the Ohio river, between that city and Cincinnati, and that subsequently the legislature of Ohio, by an act for that purpose, after reciting, *in extenso*, the Kentucky act incorporating the company, declared that "the corporation thereby "created *shall be, and the same is made a body corporate* "*and politic of this State* with the same franchises, rights "and privileges, and subject to the same duties and "liabilities, as are specified in the above recited act," etc.

Here was a re-incorporation in plain and unequivocal words, and hence it appears that this case, so far from being any warrant for holding the Boston, Hartford and Erie Railroad Company a New York corporation, under the act of April 25th, 1864, is rather, by implication, a cogent authority against any such ruling. From this case it may be argued that only express words are sufficient to create a new corporation under these circumstances.

If it shall be urged that legislative recognition is sufficient to cure a defect or irregularity of this character, we shall reply that no amount of recognition is sufficient to create a corporation. Things which exist, though in an inchoate or irregular shape might be "recognized," perhaps, into existence in full and lawful manner. But things which have never been created, and have never existed, cannot be recognized at all. If then, this corporation has been recognized in any manner by the legislature of New York, it has been recognized only as a Connecticut corporation, for such it is. Corporations are created, not by recognition, but by plain words, manifesting positive intent to create.

Shelton vs. Banks, 10 Gray, 401;
Attorney General vs. Railroad Co., 35 Wis., 425, 602;
Wallace vs. Loomis, 97 U. S., 146, 154;
Attorney General vs. Insurance Co., 82 N. Y., 172, 182.

In the case last cited, answering a suggestion that a corporation had been created by a certain act of the legislature, the court say: "The plain answer to "this contention is that the act did not create a corporation, but simply regulated one already in exis-"tence."

But again it will be urged, and it was asserted in the

opinion below, (Record, page 234), that we are estopped to deny that the Boston Hartford and Erie Railroad Company is a New York corporation, because, in the mortgage of March 19, 1866, the corporation is described as "a corporation existing under the laws of the state of New York," etc—that is to say that we are estopped by the recitals in the mortgage.

To which we reply. This is a palpable *petitio principii*—reasoning in a circle, and it is our contention that we cannot be estopped by these recitals for the following reasons:

1. A recital of a matter of law cannot work an estoppel.

2. A recital will not estop one from alleging *non est factum*.

Now the recital in the mortgage that this Company is "a corporation existing under the laws of the state of New York," etc., is a recital of a matter of law, because it depends upon the judicial construction of the act of April 25, 1864, whether or not this is the fact. The Boston, Hartford and Erie Railroad Company, not holding a charter in express words from the legislature of the state of New York, and depending entirely for its corporate existence in the state of New York upon the construction to be put upon that act, which it is the exclusive province of a court of law to determine, or upon other conclusions of law which it is the exclusive province of a court of law to draw, it follows that a recital that this company is a New York company is nothing more than an expression of an opinion upon a question of law. It is not the statement of a fact, but the expression of a conclusion upon a point of law, an opinion, in other words, it is a mere recital of a matter of law, and by such a recital we are not bound.

Turning to the authorities we find that this is the

well established doctrine of this Court. In the case of Dixon County v. Field, 111 U. S., 83, it was held that a recital in a municipal bond *of facts which the corporate officers had authority by law to determine and to certify*, estops the corporation from denying those facts, but a recital therein of facts which the corporate officers *had no authority to determine*, or a recital of law, does not work an estoppel.

Mr. Justice Harlan in the opinion, says :—"Recurring "then to a consideration of the recitals in these bonds, "we assume, for the purposes of this argument, that "they are in legal effect equivalent to a representation, "or warranty, or certificate on the part of the county "officers that everything necessary by law to be done "has been done, and every fact necessary by law to "have existed did exist, to make the bonds lawful and "binding. Of course this does not extend to or cover "matters of law. All parties are equally bound to "know the law, and a certificate reciting the actual "facts, and that thereby the bonds were conformable "to the law, when judicially speaking they are not, "will not make them so; nor can it work an estoppel "upon the county to claim the protection of the law. "Otherwise, it would always be in the power of a "municipal body to which power was denied, to usurp "the forbidden authority by declaring that its assump- "tion was within the law. This would be a clear "exercise of legislative power, and would suppose such "corporate bodies to be superior to the law itself. "And the estoppel does not arise except upon matters "of fact which the corporate officer had authority by "law to determine and to certify. * * * "This becomes very plain when we suppose the case "of such a power granted to issue bonds upon the "existence of a state of facts to be ascertained "and determined by some person, or tribunal, other "than those authorized to issue the bonds. In that "case it would not be contended that a recital of the

"facts in the instrument itself, contrary to the finding of "those charged by law with that duty, would have any "legal effect. * * * * If the officers authorized to "issue bonds upon a condition are not the appointed "tribunal to decide the fact which constitutes the con- "dition, their recital will not be accepted as a substi- "tute for proof; in other words, where the validity of "the bond depends upon an estoppel, claimed to arise "upon the recitals in the instrument, the question be- "ing as to the existence of power to issue them, it is "neccessary to establish that the officers executing the "bonds had lawful authority to make the recitals, and "to make them conclusive. The very ground of the "estoppel is that the recitals are the official statements "of those to whom the law refers the public for "authentic and final information on the subject." pp. 92, 93, 94.

See also to the same effect:

Carroll County v. Smith, 111 U. S. 556;
Northern Bank v. Porter Township, 110 id. 608;
School District v. Stone, 106 id., 183;
Town of Coloma v. Eaves, 92 id., 484;
Dillon on Munic. Corp. §419;
1 Am. Law Reg. (N. S.), 290.

This, may it please the Court, is our case. The persons who assumed to execute this mortgage, and to issue the bonds in question, were not the appointed tribunal to decide whether or not the act of March 25, 1864, was sufficient, in point of law, to constitute the Boston, Hartford and Erie R. R. Company a New York corporation. It was no part of their legal duty to pass upon that question, or to decide it in their own favor. Hence the doctrine laid down in the cases of Knox County v. Aspinwall, 21 How. 539, and town of Coloma, v. Eaves, 92, U. S. 484, has no application here. In each of

these cases there was an action by a *bona fide* holder of bonds to compel payment, and the Court held, consistently and properly, that a municipal corporation is estopped by recitals in its bonds, of facts which the statute conferring the power to issue the bonds made it the duty of the officers executing them to ascertain and determine before the bonds were issued, which is to say, that in such cases recitals of facts, which it is the duty of a public official to determine and declare, will work an estoppel in favor of a *bona fide* holder of the bonds—a position not attempted to be controverted by the appellants.

The rule thus declared can have no application in our case, because this is not an action by a *bona fide* bondholder, and the controversy is not over a recital which it was the duty of the agents of this corporation to make, but one which it was particularly not their duty to make. If it should be said that the rights of the bondholders ought, to some extent, to influence the Court in deciding this point, we reply in the language of the Court in School District v. Stone, 106 U. S. 183, 187, in deciding a similar question, "To what extent, if any, the district may be held re-"sponsible in some other form of foreclosure, is a ques-"tion not now before us, and as to which we express no "opinion."

Again, the recitals in this mortgage cannot estop us from alleging *non est factum*. We attack the mortgage as fraudulent and void, and as of no force or effect as to us. We are not, therefore, bound by its recitals.

Singer Manufacturing Co. v. Elizabeth,
42 N. J. Law, 249;
Hudson v. Winslow, 35 Id., 437.

A recital is conclusive evidence of the matter stated only when the instrument is valid.

Conant v. Newton, 126 Mass., 105.

This rule is well declared by Beasley, C. J., in the opinion in the case of Hudson v. Winslow, *supra*, as follows.—

"That a party is concluded by the admission of his "own deed is the admitted rule of law, and such admis- "sion cannot be put in dispute either by the pleadings "or evidence. But this rule, I think, has no application "to the present case. The principle is applicable only "where the existence of the deed as the act of the party, "is admitted. This is shown by the very definition of "an estoppel, which arises, in the words of Lord Coke "'When a man's own act or acceptance stoppeth or "'closeth up his mouth to allege or plead the truth,' Co. "Litt., 352 *a*. * * * In the present case, the de- "fendants in the pleas under consideration, do not ad- "mit the deed in suit. On the contrary, the facts which "they here aver, if such facts have any legal effect, "show that the obligation in question has no existence "in law. * * * Such a form of pleading is, in some "instances, not improper. Its effect is to admit the "execution of the instrument, and at the same time to "exhibit circumstances showing it is not, in law, the "deed of the party. * * * The admissions in an in- "strument, which the defendants offer to show is not, in "law, their deed, cannot, in any respect, prejudice "their right."

The foregoing argument as to estoppel will apply with equal force to all the other recitals of matter of law in this mortgage. We are no more bound, *e. g.* by the recital, that "the shareholders of the Boston, "Hartford and Erie Railroad Company, at a meeting, "duly and lawfully called and held at the city of New "York, voted," etc., etc., than by the recital that the Boston, Hartford and Erie Railroad Company is "a "corporation existing under the laws of the state of "New York," etc., etc.

Under the circumstances, as set out in the bill, it is a

question of law whether or not that meeting was "duly and lawfully called and held;" the recital did not make it lawful and regular; such a recital was only the expression of an opinion, a statement of a conclusion of law, and, as we have said, by such recital we are not bound.

II. In that it held the pretended meeting of the shareholders of the Boston, Hartford and Erie Railroad Company, on March 14, 1866, in the City of New York, lawful and regular, and the proceedings at that meeting valid and binding upon the company.

If it be established by the proceeding argument and authorities that the Boston, Hartford and Erie Railroad Company was not a body corporate in the state of New York, on March 14, 1866, it then follows, as a necessary corrollary, that the pretended meeting of its shareholders on that day, in the city of New York, was without warrant and illegal, and that the pretended transactions and proceedings at that meeting were unlawful, invalid, and wholly void and of no effect to bind the company.

In considering the question of the legality of this meeting of shareholders it should be observed, at the outset, that the question is not whether a corporation may lawfully exercise its corporate functions outside the state or country in which it is incorporated, or whether or not it can have a legal existence without the boundaries of the soverignty by which it is created, or whether an agent of a corporation may bind it by acts performed out of the state creating it, or whether the directors of a corporation may meet and lawfully transact business out of the state, or whether the directors are, or are not, a corporate body, or whether the shareholders can or cannot exist out of

the state, but, rather, precisely this: May the shareholders of a corporation lawfully meet without the limits of the state creating the corporation, and at such meeting transact business which will bind the company; or, to fit the question exactly to the case at bar, may the shareholders of a Connecticut corporation lawfully meet in New York City and bind the company by the transactions at such a meeting.

The Court below, in holding that the meeting of March 14, 1866, in New York, was a lawful one, proceeded, as it seems, upon the theory that it was a meeting of the shareholders of a New York corporation; but it intimated that the proceedings at that meeting would not have been void even if the company had not been a New York corporation.

The question, therefore, of the lawfulness and validity of such a meeting of shareholders is properly raised, and in the present condition of the law, it is fortunate that the Supreme Court of the United States can be called upon to pass upon it. There is no adjudication of this Court upon the point, as far as counsel for the appellants is advised, and there is some confusion and uncertainty in the reported cases in the state reports touching the question.

It may be taken as settled law that a corporation may, through its agents, lawfully exercise its corporate functions, in the absence of express restrictions or prohibitions, outside of the state or country creating it, as, for example, that it may make contracts, carry on its business, sue and be sued, and acquire and hold property without the state of its creation.

Bank of Augusta v. Earle, 13 Peters, 519, 588;
Runyan v. Coster, 14 Peters, 122, 129;

Railroad Company v. Harris, 12 Wall, 82;
Merrick v. Van Santvoord, 34 N. Y., 208;
Kerchner v. Gettys, 18 S. C. 521;
Ex parte Schollenberger, 96 U. S. 369;
Taylor v. Corporations, §§ 379 to 382;
Marowetz do §§ 250, 186, 187, 188.

The decided weight of authority is also in favor of the rule that the board of directors of a corporation may, in a proper case, lawfully meet and transact business which will bind the company, outside of the state or country creating the company. The directors are the agents of the corporation, appointed to manage its affairs and see to its business interests in general. An agent, it is now nowhere denied, can act for the corporation out of the state, and as McCoy, J., well said in the case of Wood Hydraulic Mining Co. v. King, 45 Ga. 40, "If one agent may thus act there would seem "to be no sensible reason why a board of agents may "not do so; as directors are only agents, the principle "is broad enough to include them."

To the same effect see:—

McCall v. Byram Manf'g Co., 6 Conn. 428;
Wright v. Bundy, 11 Ind., 398, 404;
Smith v. Alvord, 63 Barb. 415;
Bellows v. Todd, 39 Iowa, 209;
Ohio, etc., R. R. Co. v. McPherson, 35 Mo., 13;
Arms v. Conant, 36 Vt., 744;
Galveston R. R. Co. v. Cowdrey, 11 Wall, 459, 476;
Bassett v. Monte Cristo M. Co., 15 Nev. 293.

Taylor on Corporations, § 381 ;
Marowetz do. § 240.

As far as counsel for the appellants are informed, there are to be found but two decisions by courts of last resort in this country, to the effect that a board of directors may not meet outside of the state, and, upon an examination, neither of these appear entitled to any weight. The first is the case of Hiller v. Parrish, 14 N. J., Eq., 380, in which it appears that the directors of a New Jersey corporation held a meeting in Philadelphia, in disregard of express provisions of a statute of New Jersey which required all business meetings and meetings of directors of New Jersey companies to be held in New Jersey. The court in holding the proceedings at that meeting void, as contrary to the provisions of the statute, said:

"Independent of these statutory provisions it is a "rule of law that a private corporation whose charter "has been granted by one state cannot hold meetings "and pass votes in another state. It exists by force of the law that created it; and where that law ceases "to exist and is not obligatory, the corporation can "have no existence."

This loose and comprehensive *dictum*, is uttered as though it had some bearing upon the right of *directors* to meet, when, in point of fact, it does not in any way affect the determination of that question. In support of the proposition quoted the court cites three authorities, no one of which has even a remote bearing upon the question of the right of directors to meet. This case need not therefore count against the rule contended for. The other case is Ormsby v. Vermont Copper Mining Company, 56 N. Y. 623, which is plainly an unconsidered *dictum*, included in the memoranda of causes not reported in full, at the end of the volume.

The question whether or not directors may meet and transact business lawfully outside the state, is simply the question whether the corporation can act by its agents outside the state. That question is conclusively settled; there seems to be no reason in law, or expediency, or common sense, why the right of directors so to act, should be any further questioned; the courts and the elementary writers concur in the opinion that such meetings of directors are lawful and proper.

Wood on Railways, 346, § 140, and the authorities cited above.

But when we come to the question of the right of shareholders of a corporation to hold meetings outside the state, and to bind the company by proceedings at such meetings—the precise question upon which this Court is now to pass—we are immediately confronted by an entirely different set of considerations. We are now face to face with the question—not whether a corporation can act, *by its agents*, outside of the state of its creation—but whether the corporation itself can so act, and, if it can, whether consideration of public policy will warrant the courts in suffering so to act.

This statement of the point in controversy assumes that, for practical purposes, the shareholders are the corporation. As the law is developed and adapts itself to the wants and conditions of recent times, it is to be observed that Lord Coke's fiction of a corporation as a "legal person" is fading away. Mr. Taylor, in his learned and philosophical work on "The Law of Private Corporations having Capital Stock," says:

"On the whole, it is more in accordance with the "ordinary use of terms, and a far clearer and more "serviceable conception, to regard the corporation as

"consisting of the shareholders, who may with propriety "be said to constitute the body corporate. * * * "The shareholders then, vested with the corporate "powers, are the body corporate, corporation or com- "pany. It is their acts, when done in the manner pre- "scribed in the constitution of the corporation, that "are, properly speaking, acts of the corporation," §§ 49 and 50.

Cf. Wright v. Bundy, 11 Ind. 398, 404.

What the shareholders do, therefore, *qua* shareholders, the corporation does. Their acts, within the proper scope, are corporate acts, and except what the shareholders do, as shareholders, directly or by their agents, these are no corporate acts. Sweeping away the fiction the shareholders collectively are the corporation.

The question what the shareholders may do, is the question what the corporation may do. The question may the shareholders, as shareholders, act collectively without the state, is the question, may the corporation, as a corporation, *in propria persona*, act without the state. This question as it affects the case at bar, is two-fold.

1. Have shareholders the power to meet and act out of the state creating the corporation?

2. Will public policy, and considerations of general convenience, permit them to exercise such a power even if it exist?

The elementary writers and the courts alike, with practical unanimity, answer each of these questions in the negative, and as we submit, upon the soundest grounds.

The leading case is Miller v. Ewer, 27 Me., 509, in which it is declared with great clearness, that all votes and proceedings of persons professing to act in the capacity of corporators when assembled without the bounds of the sovereignty granting the charter, are wholly void. We may well quote from the opinion of Shepley, J., herein at length.

"There are a variety of corporations. It will only "be necessary on this occasion to speak of one class of "them—corporations aggregate, composed of natural "persons. It is often stated in the books, that such "a corporation is created by its charter. This is not "precisely correct. The charter only confers "the power of life, or the right to come into "existence. * * * The corporators, as natural "persons, have no such power. The charter confers "upon them a new faculty for this purpose, a faculty "which they can have only by virtue of the law which "confers it. That law is inoperative beyond the "bounds of the legislative power by which it is enact-"ed, as the corporate faculty cannot accompany the "natural persons beyond the bounds of the sovereignty "which confers it, and they cannot possess or exercise "it there—can have no more power there to make the "artificial being act than other persons not named or "associated as incorporators, any attempt to exercise "such a faculty there is merely an usurpation of au-"thority by persons destitute of it, and acting without "any legal capacity to act in that manner. It follows "that all votes and proceedings of persons professing "to act in the capacity of corporators when assembled "without the bounds of the sovereignty granting the "charter are wholly void. This is a familiar princi-"ple when applied in analogous cases to persons upon "whom the law has conferred some power or faculty "which as natural persons they do not possess. The "power conferred by law upon executors and adminis-"trators cannot accompany their persons beyond the "bounds of the sovereignty which has conferred it."

The learned Judge then proceeds to declare that corporations may, as of course, act through agents outside of the state creating them, and that boards of directors may assemble and act in like manner outside the state. Then, after a consideration of the provisions of the statutes of the state in point, and the terms of the charter of the company whose shareholders had assumed to act outside of the state, the conclusion of the whole matter is set out in these words:

"Whether the statute provision of this state, and "the intention of the legislative power, or the gen- "eral rules of law respecting corporations be exam- "ined, the conclusion must be the same; that this "corporation could hold no meeting for the election "of its officers, or for the regulation of its affairs with- "out the limits of this state; that all such meetings "and proceedings were without right or authority and "wholly void."

See also to the same point :—

Bank of Augusta v. Earle, 13 Peters, 519;
Freeman v. Machias Water Power, etc., Co., 38 Me., 343;
Aspinwall v. Ohio, etc. R. R. Co., 20 Ind., 492;
Camp v. Byrne, 41 Mo., 525;
Heath v. Silverthorn, etc., Co., 39 Wis., 146, 152;
Bellows v. Todd, 39 Iowa, 209, 217;
Ohio, etc., R. R. Co. v. McPherson, 35 Mo., 13;
Mitchell v. Vermont Copper Mining Co., 40 N. Y. Super. Ct., 406;
Farnum v Blackstone Canal Corporation 1 Sumner, 46;
Day v. Newark India Rubber Manfg. Co., 1 Blatchf., 628;

Taylor on Corporations §382;
Morawetz do §363;
Angell & Ames do §448;
Potter do §356 to 359;
Wood on Railways §139;

"All stock-holders meetings," says Mr. Wood, the latest writer upon the Law of Railways, "must be held "in the state under whose laws the corporation is "organized · or, according to the great weight of "authority, all its proceedings are wholly void."

Wood on Railways, §139, page 344.

No single adjudication was cited in the court below in support of the proposition that meetings of shareholders out of the state are lawful, and it is confidently asserted that no such decision of any court of last resort can be found.

Shareholders can meet and act in the capacity of shareholders, only by virtue of the power conferred upon them in their charter. The charter is a legislative act and has no force or validity beyond the limits of the state. The power of the shareholders to do acts in the capacity of shareholders may, therefore, well be held to be bounded by the state lines. Within those lines they have an artificial capacity to act, but without the lines the artificial capacity is gone. Within the limits of the state the shareholders are the corporation, but when they cross the line the enabling force of the legislative act is gone and they are no longer a corporation. When they meet within the state, in the prescribed manner, they constitute a lawful shareholders meeting, but when they meet without the state, they are merely a company of gentlemen away from home, and the meeting can have no significance whatever as a shareholders meeting, inasmuch as a meeting, as shareholders is possible for them only within the state.

Consider the consequence of a contrary rule. If they may lawfully meet once as shareholders without the state they may do so twice—or ten times or always—and, if so, they may exist as a body corporate in another state, precisely as they were incorporated to exist at home, and it comes to pass accordingly that it is within the power of any state to incorporate a company in another state, or it is possible for a set of men incorporated in one state to make themselves a corporation of another state by their own act, and so, *presto*, the exclusive prerogative and power of the state to create corporations within its borders vanishes, and there may be as many corporations created in any state as all the legislatures of all the rest of the world can charter, or as many as the shareholders of all the foreign corporations in the world elect.

Unless the entire theory upon which our modern law of corporations rests, and upon which the state assumes the sovereign prerogative of incorporating companies within her borders is to be abandoned, corporations must exist only in the state creating them. And if shareholders have the capacity to hold corporate meetings in foreign states, then they exist as stockholders in such foreign state, and they are the corporation, and so the corporation exists, and there is an end, in this vicious circle, of the whole matter; for here we have a corporation existing where it was not created, by virtue of the legislative act of a foreign state.

But again, upon considerations of public policy and general convenience, and quite apart from any legal complications, we submit that any rule which permits shareholders in corporations having capital stock, to meet and bind the company by corporate acts, without the state creating the company, opens a wide door for fraud, and oppression and injustice.

If shareholders may lawfully meet without the state, it is plain that they may meet *anywhere* without the state, and it will be held that the shareholders of a Connecticut company may meet, not only in New York, but also in New Orleans, or London, or Calcutta, or anywhere in the world where the meeting can be procured to be called. This, it is plain, would be a clear subversion of the rights of the shareholders, especially of the smaller shareholders, and would be an easy cover for any rascality contemplated with reference to the corporate property. A corporation, in order to answer the purpose for which corporations are usually created, that is, in order that it may honestly accomplish honest ends, must have a local habitation as well as a name. It must have a home and stay at home, so that all persons dealing with it, or owning its stock, may have notice where it is to be found.

And when one buys stock in a corporation it is to the business interests of the community that he be assured that that corporation is a fixture, that it will never be carried bodily away, and that he will never be called upon to attend stockholders' meetings at some distant place. In by far the greater number of instances this question can never be of practical importance. Most corporations are created for local purposes, and could never be fraudulently moved to a distant place: and stock in these corporations is, perhaps, generally owned, for the most part, by persons somewhat concerned in the actual management of the affairs of the company. This is largely true in the case of banks, insurance and trust companies, and the many mercantile corporations which have been created in recent years. But there is another, and in this country a growing class of incorporated companies — as, for example, railway and steamship, express, mining and telegraph companies — whose

stock is often owned by a very large number of persons, holding it in various capacities, and living in every part of the world. It is particularly the right of shareowners in such companies to be assured that the companies in the stock of which they have invested their means will remain fixed and stationary in some certain place. If it is a Connecticut company that it will remain such, that the business will be conducted in that state, and especially that such part of the business as the shareholders take part in will always be done there. Considerations of this nature frequently induce subscriptions to stock or purchases of stock. A sound public policy requires that such assurances be not diminished, but rather increased, as occasions arise, by judicial decision. The smaller shareholder is especially concerned that the larger holders of the stock be not allowed to prejudice or imperil his interest by procuring meetings of the company to be called at places where he must either be unrepresented or trust his interest to the uncertainty of a proxy. The com munity at large is concerned in having the affairs of corporations so managed and controlled as to prevent as much as possible unwarranted and fraudulent assumption of control of them by unscrupulous men. It concerns the public that the affairs of the great corporations of the country be honestly managed in the interest of the shareowners and of the public. And we very respectfully submit that a rule made imperative that shareholders' meetings shall never be held, to bind the company, outside of the state, is a sound rule of law, and one calculated to promote honest management and honest shareholders' meetings; while any other rule, permitting shareholders' meetings to be called anywhere, tends to facilitate fraud and directly jeopardizes the property of the shareholders.

III. In that it held the Mortgage of March 19, 1866, known as the "Berdell Mortgage," valid and binding on the Company.

It is our contention that this mortgage is void, and in no way effectual to bind the company upon the following grounds :—

1. Because the pretended meeting of the shareholders in the city of New York, at which the mortgage is pretended to have been authorized, was an unlawful meeting and its proceedings wholly void.

2. Because, even upon the theory that the meeting in New York was lawful and regular, no mortgage was authorized at that meeting, nor have the shareholders at any subsequent meeting ever pretended to authorize it.

3. Because the whole transaction from beginning to end was *ultra vires.*

4. For fraud.

To consider these objections to the mortgage in their order, it may be remarked, *first*, that, inasmuch as the Boston, Hartford and Erie R. R. Co. is not a corporation created and constituted by an act of the legislature of the state of New York, and is not, therefore, a New York corporation, and because, in consequence, no lawful meeting of its shareholders could be held in the state of New York, the proceedings at the pretended meeting of March 14, 1866, in the city of New York whatever such proceedings may have been, could not have authorized any mortgage of the property and franchises of this company which could, in any way, bind the corporation. It follows necessarily from the premise that this company was not a New

York corporation, and that the meeting of shareholders was pretended to be held in New York, that the proceedings at such feigned meeting were void, and could not bind the company. There was no lawful meeting, and hence no binding act.

By section 8 of the Charter of the Boston, Hartford & Erie R. R. Co., it is provided that "said company "may, by a vote of the stockholders at a meeting law- "fully called for the purpose, secure any bonds, etc., by "mortgage of their railway," etc. This method of making the mortgage being expressly prescribed by the charter, is exclusive. The corporation is empowered to make a contract and to make it in a certain specified way. They may, therefore, if they elect, make the contract, but only in the specified way. "The act of incorporation," says Chief Justice Marshall speaking to this point in the case of Head, etc. v. the Insurance Co., 2 Cranch. 127, 169, "is to them an "enabling act; it gives them all the power they possess; "it enables them to contract, and when it prescribes to "them a mode of contracting they must observe that "mode, or the instrument no more creates a contract "than if the body had never been incorporated." See also Hill v. Manchester, etc., Co. 5 B. & Ad. 874.

The attempt then, to authorize this mortgage at the New York meeting on March 14, 1866, was an attempt to make a contract for this company in a manner not prescribed by the charter, at a meeting not "lawfully called for the purpose," and hence no contract was made—no mortgage, by any possibility, authorized. The corporation could be bound only in the manner prescribed in the charter. It could be bound in no other way, and hence was not bound by the pretended proceedings at the New York meeting. "The powers "of a corporation organized under a legislative char- "ter are only such as the statutes confer, and the enu-

"meration of them implies the exclusion of all others." Thomas v. Railroad Co., 101 U. S., 71.

But it is argued that the proceedings of the New York meeting must be held to bind the company, because by subsequent acts of the legislatures of New York, Rhode Island, Connecticut and Massachusetts, these proceedings were duly ratified and confirmed, and that by such legislative ratification the mortgage was validated.

To which we reply that no amount of legislative ratification is sufficient to make a contract, or to make an act which is absolutely void, valid and effectual. These legislatures plainly had no power to compel this company to make a mortgage, nor could the legislatures make a mortgage for the company. There is only one way whereby the property of this company could be lawfully mortgaged; namely, by act of the shareholders at a lawful meeting. Without such act at such a meeting there could be no mortgage, and there being no mortgage created by act of the shareholders, no act of the legislature of any state could operate to create one. The pretended proceedings at the New York meeting were not merely voidable—a condition of things which implies a power somewhere to ratify and validate an existing entity, but absolutely void, a mere nullity—a state of things which excludes the idea of a thing to be validated, and, by consequence, a power to validate. It is settled law that legislatures cannot ratify what they could not have authorized at the beginning. The meeting of shareholders in New York was not merely a meeting that was technically irregular, and the proceedings at that meeting were not merely formally defective, but the meeting was unlawful and unauthorized and impossible, and the proceedings were wholly void, and of no possible force or effect.

It was not within the power of the legislature of Connecticut to authorize the meeting of the shareholders of a Connecticut corporation in New York, nor could the legislature of Rhode Island or Massachusetts have authorized such a meeting. And the legislature of New York, unless it had first, by an express act, created a new and distinct corporate being in and for the state of New York, could not have authorized that meeting. There was nowhere any power in any legislature to authorize the shareholders of a Connecticut corporation to meet in the city of New York and mortgage the property and franchises of the company, because the law of a state, having no extra territorial efficiency, cannot operate to domesticate its corporation in a foreign jurisdiction. Upon the theory upon which our law of corporations proceeds, such a meeting is not, as we have seen, possible. The Connecticut shareholders can meet, *qua* shareholders, only in Connecticut. They exist as shareholders only in that state. A meeting elsewhere is an impossibility, pure and simple. No legislature can authorize an impossibility, and what the legislature cannot authorize primarily it cannot ratify, or validate retrospectively. This is not only the logic but the law of the contention.

"If the legislature possessed the power," said the Supreme Court of the United States in the case of Thompson v. Lee County, 3 Wallace, 327, 331, "to authorize the act to be done, it could by a retro-"spective act cure the evils which existed, because the "power there conferred had been irregularly executed." which is to say that, where power duly conferred, or possible to be conferred, has been irregularly or defectively executed, the legislature has power, by a curative act, *ex post facto*, to heal the irregularity or supply the deficiency. But this is the necessary limit of the power. There is no adjudication of any court, nor *dictum* of any

jurist, that sanctions the doctrine that a contract between individuals void in its inception, may be validated by subsequent legislation. It is beyond the power of legislatures to make a contract for parties, and it is equally beyond their power to transmute a nullity into a valid and effectual obligation. *Quod ab initio non valet in tractu temporis non convalescet.*

Broom's Maxims, 178 (m.p.)

If these legislative ratifications be operative and effectual their effect will be to bind parties by a contract they never made, and then to forfeit their property for non-fulfilment of that contract.

This is the learning in the case of Barnes v. Town of Lacon, 84 Ill. 461, wherein it was held that where, an election for the purpose of voting upon a subscription to a railroad was held without authority of law, and in pursuance of a vote at such election a subscription was made by the supervisor of the town, without any authority of law, the whole proceeding was void, and that the legislature could not by any subsequent act legalize and validate it. In the opinion the court seem to rely upon the authority of an earlier case (Marshall v. Silliman, 61 Illinois, 218) in which, in deciding against the constitutionality of an act of the legislature which assumed to validate a void election, it is said;—

"Our conclusion is that the so-called curative act "was a violation of the Constitution. Its object "was to compel this town to issue its bonds for rail-"road stocks, independently of its own wishes, and "this was beyond the limits of legislative power. It "sought to accomplish this by declaring that a void "proceeding was a valid one; that a vote confessedly "illegal was in fact legal. But this vote was an accom-"plished fact. *Whether it was within the corporate "powers of the town, and binding upon its people, was a "question which no subsequent legislature could affect*, and

"when the legislature undertook to say that this vote "created a valid obligation against the town, when it "did not, it was attempting by its own act, to create a corporate debt."

See also People v. Batchelor, 53 N. Y., 128.

Marshall v. Silliman, (*supra*), was an action brought by certain taxpayers of the town, to enjoin the railway company from negotiating the bonds, but in Barnes v. The Town of Lacon (*supra*), in which the same principle is declared as to a void election authorizing a subscription, the action was brought by a *bona fide* holder of the bonds—and the court held that bonds which had been issued in pursuance of a vote at an election which was void, could not be enforced even in the hands of such a holder.

Mr. Wade in his treatise on Retroactive Laws, (§ 268) in discussing the doctrine in these two cases says:—

"The consequences of recognizing this power," (i. e. the power to validate void elections, etc.,) "as belong- "ing to the legislature would be to open the widest "possible door for disregard of constitutional restraints. "If the legislature might legalize a proceeding in the "form of an election, it might, in the exercise of the "same power, validate any such proceeding, however, "fraudulent, and however inadequate as a fair expres- "sion of the popular will, it might be. This would be "to place it within the power of the legislative body to "render the constitutional restraints upon its power "utterly nugatory."

See Wade's Retroactive Laws, §§ 263 to 269, inclusive.

This mortgage was not, therefore, we insist, valid or binding upon the company, in any wise, be-

cause of any subsequent acts of any legislative body assuming to confirm and ratify any proceedings of any meeting of shareholders which are pretended to have authorized it.

In the court below the learned judge cited Shaw v. Norfolk Co. R. R. Co., 5 Gray, 162, and Howe v. Freeman, 14 Gray, 566, as authority for the proposition that these legislative acts were sufficient to validate this mortgage (Record page 234).

This, we respectfully urge, is entirely to misconceive the matter in issue. Our mortgage was not defective and irregular, as we have seen. It was absolutely void. If there had been some mere defect in the instrument, or some irregularity in the proceedings authorizing it, then it is conceded law that, in a proper case, the legislature might cure the defect and validate the transaction. In the case of Shaw v. Norfolk Co. R R. Company, *supra*,—a leading case –there was a mortgage in all respects perfectly regular and lawful and valid and unchallenged—technically and exactly correct, and the legislature ratified and confirmed it, as it appears upon the theory that the corporation could not mortgage its property without legislative consent. The act of the legislature did not operate to cure even a trifling defect. It merely lent a sanction for greater security, as it were, to what had not been questioned. This is clearly not our case. Our question is, can a legislative act make a void mortgage a valid mortgage? Can it create a mortgage? Can it make out of a mere nullity a valid and subsisting claim upon corporate property?

In Howe v. Freeman, *supra*, also cited by the court below, we find again a valid mortgage sanctioned by a legislative act. The court, speaking of the mortgage, says: "Its authority has never been questioned by "the corporation. We are satisfied that the legislature

"intended to confirm and sanction this identical mort-
"gage in all its provisions, as a legal act on the part of
"the railroad company, and thus to give greater secu-
"rity to the bondholders, and incidentally to benefit
"the company by removing all doubts as to the valid-
"ity of the mortgage and the security in the hands of
"the trustees." In each of these cases there was a mortgage regularly and lawfully made, which it was competent for the legislature to have authorized at the beginning, and which, for greater security, the legislature confirmed after execution. There is no contention that such legislative ratification and confirmation is not lawful and proper. (Jones on Railroad Securities, § 14.) In our case our contention is that, conceding that these legislatures might have law fully authorized *a* mortgage of this property, they never could have authorized *this* mortgage, or any mortgage made as this one was made, and hence that they could not validate it by never so much confirmation and ratification; that our mortgage was void, not irregular, and being void not amendable by any exercise of a legislative power to cure defects and overlook irregularities. MacNamara on Nullities, 24 (m.p.)

But in the second place, without any reference to the question whether or not the meeting of shareholders in New York of March 14th, 1866, was a lawful and regular meeting, or whether the proceedings at such meeting were binding on the company, we make the point that no mortgage was authorized at that meeting, and that it has never been pretended that the shareholders have ever at any other meeting authorized it, or ratified or affirmed such a mortgage in any shape whatever.

The recital in the mortgage itself, touching this point, is as follows:

"Whereas the shareholders of the Boston, Hartford
"and Erie Railroad Company, at a meeting duly and

"lawfully called and held at the City of New York, "on the fourteenth day of March, A.D. 1866, voted to "authorize the directors to make application to the "several legislatures of the states in which the "chartered rights of this road exist, for authority to "make a mortgage," etc., etc.

It appears, therefore, that what this pretended meeting of shareholders assumed to do was to authorize the directors to apply to the legislatures for authority to make a mortgage. The meeting was held on the 14th of March, and on the 19th, five days after, the mortgage was executed by the officers of the company, at the instance of the directors, without any pretense of an application to any legisture for any authority whatever. The most that the shareholders assumed to do, even if the New York meeting had had the legal capacity to do anything, was to authorize, not a mortgage, but an application to the legislature. Any act, therefore, on the part of the directors, looking to a mortgage, beyond an application to the legislature, was unauthorized even by this unauthorized shareholder's meeting. Accordingly it seems that there was not even the shadow of a shade of an authority for the execution of this mortgage on March 19, 1866. The meeting of the shareholders was then a mere form, or a mere farce, for it had no power to authorize anything; it did not pretend to authorize this mortgage, and what it did pretend to authorize was never done. It would have been as well then, as far as this mortgage is concerned, if this pretended meeting of shareholders had never been held. Even as a pretence it appears to have had very little connection with the mortgage of March 19, 1866.

In the third place we urge, as against the validity of this mortgage, that the whole transaction out of which the mortgage grew was *ultra vires*. The action of the directors in making and executing this mortgage was

ultra vires, because it was done without authority either of the stockholders or the legislature. The pretended meeting of the stockholders did not authorize the mortgage ; no lawful meeting of stockholders ever authorized it ; no act of any legislature authorized it, and no act of any legislature subsequently has availed to validitate it. It was, therefore,executed entirely without those sanctions which the charter requires.

Section seven of the charter is, viz :—

"Said, Boston, Hartford and Erie Railroad Company "may by a vote of the stockholders at a meeting,lawful-"ly called for that purpose, secure any bonds they may "issue, etc., etc., by a mortgage, etc., etc., if empower-"ed so to do by the laws of any state into, or in which "the railroad, etc., etc., may be situate."

If the charter contained no provision as to a mortgage of the property the company might, if permitted by the general law, mortgage its property in any lawful way, but when the charter specially prescribes the way in which the mortgage is to be made, then that way must be strictly pursued, and any departure is *ultra vires*. This is common learning. This mortgage was not made and executed, we insist, as the charter prescribes, but was made by the directors in an entirely different and wholly unauthorized way. It was, therefore, an act *ultra vires*, and by such an act the corporation is not bound. (Thomas v. Railroad Co., 101 U. S., 71).

Finally, we urge that the foreclosure of this mortgage is void and ineffectual to bind the company, for fraud.

We have charged in the bill (see the Record, pp. 9-39 *passim*), and seek an opportunity to prove, that this mortgage and the foreclosure proceedings were the result of a fraudulent conspiracy on the part of

divers persons named in the bill, to wreck the Boston, Hartford and Erie Railroad Company, and thereby to get possession of its property and franchises. In our pleading we have set forth, distinctly and plainly, facts, transactions and proceedings connected with the making and execution of this mortgage, the issue of bonds secured by it, and the disposition of the money derived from the sale of the bonds, which constitute a fraud and breach of trust. We have not uttered generalities, nor contented ourselves with a charge that the acts complained of were fraudulent,—that is, we have not pleaded conclusions of law, nor pleaded an opinion as to the legal character of these acts, but we have pleaded the facts. Our bill is, therefore, technically correct on this point, and within the rule of this Court as to the sufficiency of a pleading which charges frand.

Van Weel v. Winston, 115 U. S., 228;
Ambler v. Choteau, 107 U. S., 586, 590.

We have, moreover, pleaded the circumstances and details of these transactions with all the particularity and definiteness possible. Many of the transactions were, of course, private, and purposely concealed, and much of the whole business was carried on in the dark. We have, therefore, prayed a discovery, and have pleaded as fully as possible. This is all the rules of pleading in such a case require. The rule, as we understand it, is, that we must, on the one hand, do something more in our bill than prefer vague and general charges of fraud and conspiracy and violation of trust obligations, but that we are not barred of our right to ask relief in a court of Equity, merely because, the fraud being secret in its nature, we cannot plead as fully and specifically as though our action were at law on a promissory note.

We charge, that the meeting of shareholders of the Boston, Hartford & Erie Railroad Company, in the city of New York, in the office of the Erie Railway Company was covinous and collusive, and in fraud of our rights. The meeting could not lawfully be held, and so it could not honestly be called in the city of New York. Least of all could it be properly and honestly held in the office of the Erie Railway Company. We charge that the execution and delivery of the deed of trust five days after this pretended meeting, was wholly fraudulent. The directors had no right to authorize such a deed, and the officers of the company no right to make it. We charge that neither Robert H. Bardell nor John S. Eldridge had any right, because of their connection with this Company and with the Erie Company at the same time, to be trustees under this deed, and that, in consequence, their exercise of that function was fraudulent. We charge that the issue of the bonds and the disposal made of them was wholly fraudulent. We charge that the money derived from the sale of these bonds was, for the most part, converted in fraud of our property rights. We charge that the trust was not honestly administered in any particular by these trustees; that they betrayed the trust, and stole our money and wasted our property. We charge that there was nothing good, or honest, or legitimate in the transaction in any part of it, from the time the mortgage was conceived until it was foreclosed, and that the whole proceeding was in fraud of our rights. Because of this fraud, we insist that we are not bound by this pretended mortgage.

"Fraud," said Mr. Justice Story, in the case of The Amistad, 15 Peters 518,594, "vitiates any, even the "most solemn transactions; and an asserted title to "property founded upon it, is utterly void." This is the unchallenged doctrine of Equity.

With respect to the title to the property it may be remarked here that, if this mortgage be void and of no

effect, it could not have operated in foreclosure to divest the Boston, Hartford and Erie Railroad Company of the property covered, or pretended to be covered by it. Whatever title the New York and New England Railroad Company may claim to this property was derived by virtue of the mortgage foreclosure. This is expressly declared to be the foundation of their title by the Supreme Court of Rhode Island in the case of the Boston and Providence Railroad Company v. New York and New England Railroad Company, 13 R. I. 260, 269, 270. In this case the court said, in passing upon this very title as vesting in the New York and New England Railroad Company, "the mortgage "and not the deed was the foundation of their title, * * * and the conveyance" [by the assignee] "simply ancillary to the title under the mortgage." Hence, if the mortgage be void, the title derived from it is nullified.

Debile fundamentum fallit opus.

And we conclude, *first*, that the title of the Boston, Hartford & Erie R. R. Co. has never been divested, because the mortgage by virtue of which alone its franchises and property are pretended to be alienated, was a nullity; and *second*, the New York and New England Railroad Company acquired no title, not only because the title of the Boston, Hartford & Erie Railroad Company has never been divested, but also, for the further reason that, even upon the assumption that the Boston, Hartford & Erie Railroad Company has been divested of its title, the title has never been conveyed to the New York and New England Railroad Company.

Finally, we remark that the mortgage bears about upon its face the evidence of its own invalidity, and of this invalidity all persons, therefore, had notice. It

is recited in the mortgage (p. 41 of the Record), that the meeting of stockholders was held in New York, and that the power given to the directors was, not to make a mortgage, but to apply to certain legislatures for authority so to do. This is a certification of the inability of the directors to make a valid mortgage without such legislative authority. The date of the mortgage in connection with the date of the meeting, both being published in the instrument itself, declares the impossibility of any such proper application for a grant of authority to validate this mortgage. Moreover, of the rule of law that a stock-holders meeting of this company could not lawfully be held in New York all persons are conclusively presumed to have knowledge,

In Re Assurance Society, 30 L. J. Chan. 137;
Balfour v. Ernest. 5 C. B. (N. S.) 601;
In Re Atheneum Society, 4 K. and J. 549.

We believe, therefore, that it is clear that this mortgage was invalid to bind these appellants.

In McClure v. Township of Oxford, (94 U. S. 429,) it was held by this Court, that where bonds carry on their face, evidence of their unlawful issue or execution, they are wholly void, and no holder of such a security will be heard to claim *bona fides*. And in a very recent case, (Hayes v. Holly Springs, 114 U. S. 120,) it was held that bonds, void for want of power to issue them, are not validated by any recitals on their face, or by any acts *in pais* claimed to operate by way of estoppel, and that too, even in the hands of a *bona fide* holder. "Recitals," says Mr. Justice Blatchford in the opinion in this case, "on the face of a bond, or "acts *in pais*, operating by way of estoppel, may cure "irregularity in the execution of a statutory power,

"*but they cannot create it.* If, as in the present case, "legislative authority was wanting, the bond has no validity."

See also in point:—

Horton v. Town, of Thompson, 71 N. Y. 513, 523, 526;
Thompson v. Perrine, 103 U. S. 806;
Scovill v. Thayer, 105 U. S. 143.

IV, In that it held the proceedings and decree in the Ellis suit in the Supreme Judicial Court of Massachussets valid and regular, and binding upon these appellants, and the decree of foreclosure a bar to this suit.

It is our contention that we are not bound by the proceedings and decree in that suit, nor barred thereby, for the following reasons :—

1. We were not party to that suit.

2. There was no real controversy in the suit—it was a mere collusive proceeding.

3. The suit is still pending and undetermined.

To consider these points in order, we remark that, while it is conceded that the shareholders, in their collective capacity *qua* shareholders, are the corporation, it is insisted that the shareholders individually and severally are in no sense to be regarded as identical with the corporation. A suit against the corporation is not a suit against an individual incorporator, and such incorporator is, in no proper view, a party to such a suit. The corporation has a personality distinct from that of its individual incorporators, and its property,

rights, duties and liabilities are wholly distinct from theirs. The property of the corporation is not the property of the shareholder.

Morgan v. New Orleans, etc., R. R. Co., 1 Woods 15,

nor is the stock which is the property of the shareholder in any way the property of the corporation.

People v. Commissioners, etc., 23 N. Y. 220.

It is even sometimes said that no trust relation subsists between stockholder and corporation.

Hodges v. New England Screw Co., 1 R. I. 350;
Angell & Ames on Corp., § 313.

A stockholder is not a creditor of the corporation.

Verplanck v. Mercantile Ins. Co., 1 Edw, Chan, 84.

Hence it results that the appellants as shareholders in the Boston, Hartford and Erie R. R. Co. were not debtors to the plaintiffs in the Ellis suit, and were, therefore, not parties to that proceeding. [Conro v. Company, 12 Barb. 61.] The suit was brought against the corporation which was made defendant of record. The alleged debt was due by the corporation, not by the shareholders. The remedy sought was against the corporation; the judgment went against the corporation; an execution would have reached only corporate property, and, except by a separate proceeding, directed particularly against the shareholders, *eo-nomine*, they could not have been reached.

Sanger v. Upton, 91 U. S., 55, 59, was cited in the court below in support of the respondent's proposition that the shareholders were bound equally with the company by the decree of foreclosure in this suit. An examination of this case, however, reveals the fact that it was an action to try the validity, or sufficiency, of a order in bankruptcy, made by a District Court of the United States, directing the assignee to collect from certain delinquent stockholders the amount due from each to the bankrupt company. The court held that the decree gave jurisdiction and authority to make the order, and that, inasmuch as the order was specially directed against these delinquent shareholders, they could not question its validity. This, it therefore appears, was a statutory proceeding, to be governed by the rules of a Court of bankruptcy; there was an action directly affecting individual shareholders in their private property rights, and the court, without holding them parties to the action, thought them incompetent to question the validity of the order. We insist that this case is no authority here for the proposition in support of which it was cited. Our position is that the corporation is one entity, and the individual shareholder another and distinct entity. In a proper case the shareholder may sue the corporation. This implies the distinct existence of each. Inasmuch then, as we were not a party to the Ellis suit, we are not bound by the decree of foreclosure or by any of the proceedings therein.

But, in the second place, even if it shall be held that we were a party thereto, to the extent of being before the court by construction of law, we say that we are not bound because the suit was a mere collusion, that there was no such genuine controversy as to give a court jurisdiction, and that the judgment was therefore null and void upon challenge, and of no effect to bind any stockholder not a party to the fraud

It is set forth in the bill, and admitted by the demurrer, that, in the Ellis suit, one Lane was both plaintiff and defendant, that the suit was brought by him in the name of his clerk ; that neither he nor his clerk was a *bona fide* creditor in such a way as to enable the suit to be lawfully prosecuted ; that the suit was maintained by Lane, and his confederates, on the one hand, and defended, or pretended to be defended by Lane and his confederates on the other hand. Lane was, therefore, *dominus litis*. There was no controversy, there was no jurisdiction, the whole proceeding was in contempt of court, and the formal judgment was a nullity. In such a case, and by such a pretended litigation we are not bound. This is settled law in this Court.

Fletcher v. Peck, 6 Cranch. 87, 147, 148;
Lord v. Veazie, 8 How, 251, 255, 256;
Cleveland v. Chamberlain, 1 Black, 419 425;
Wood-Paper Co. v. Heft, 8 Wall, 333.
Cf. Hoskins v. Lord Berkeley, 4 Term, 402;
In the matter of R. J. Elsam, 3 B. & Cres., 597.

It needs no argument that, if the Ellis suit was such a suit as by demurrer it is admitted to have been, the decree and all the proceedings were void. The demurrer, for the purpose of this proceeding, admits the material allegations of our bill. The Ellis suit is, therefore, for the present, such a proceding as the bill represents.

Mr. Justice Taney in the opinion in the case of Lord v. Veazie, *supra*, in passing upon such a collusive suit, as, for the present, the Ellis proceeding is to be assumed to have been, after defining what it meant by an amicable action, says :

"The objection in the case before us is, not that the "proceedings were amicable, but that there is no real "conflict of interest between them, and that the plain- "tiff and defendant have the same interest, and that "interest adverse and in conflict with the interest of "third persons, whose rights would be seriously affected, "if the question of law was decided in the manner that "both of the parties to this suit desire it to be. A "judgment entered under such circumstances, and for "such purposes, is a mere form. The whole proceeding "was in contempt of the court, and highly reprehens- "ible, and the learned district judge who was then "holding the Circuit Court, undoubtedly suffered the "judgment, *pro forma*, to be entered under the impres- "sion that there was in fact a controversy between the "plaintiff and defendant, and that they were proceeding "to obtain a decision upon a disputed question of law "in which they had adverse interests. A judgment in "form thus procured in the eye of the law is no judg- "ment of the court. It is a nullity, and no writ of "error will lie upon it."

To have the effect of *res adjudicata*, a judgment or decree must be "a judicial determination of a cause " agitated between real parties, upon which a real " interest has been settled. In order to make a sentence, " there must be a real interest, a real prosecution, a real " defence and a real decision. Of all these requisites, " not one takes place in a fraudulent or collusive suit. " There is no Judge, but a person invested with the " insignia of a judicial officer, is employed in listening " to a fictitious cause proposed to him. There is no " party litigating; there is no party defendant, no real " interest brought in question."

Wedderburn *arguendo*, Dutchess of Kingston's Case, 20Howell's State Trials, 478, adopted by Lord Brougham, in Earl of Bandon v. Becher, 3 Cl. and F. 479, 510.

Cf. Spencer v. Vigneaux, 20 Cal, 442.

The later cases in all the courts are to the same effect.

Now we allege, and it is admitted, that Ellis, the clerk of Lane, brought this suit, and that Lane carried on the suit, through Ellis, as plaintiff; that then Lane, being President of the Boston, Hartford, & Erie, R. R. Co., defended the suit—the very suit that he was prosecuting as plaintiff; that he retained the counsel on each side, and paid them both, and that, on an agreed statement of facts—an agreed state of facts between his two sets of counsel—the question of the standing of the trustees under the Berdell mortgage and the regularity of their appointment was brought before the court. In this condition of the controversy an adjudication was obtained, by which it is proposed to bind us here. We insist that we are not bound; that, in the language of this Court, speaking by Chief Justice Taney, "The whole proceeding was "in contempt of the court, and highly reprehen- "sible," and that the judgment is void and of no effect to bind anybody but the immediate parties to the fraud.

But, finally, we urge that we are not bound by the decree in the Ellis suit, because it appears that, at the time of the filing of the bill herein, (page 20 of the Record,) the suit in Massachusetts was pending and undetermined, that it still is pending and undetermined, and for the reason that it is settled law that the pendency of a suit in a state court is no answer and no bar to a suit in a Federal Court.

Gordon v. Gilfoil, 99 U. S., 168, 178;
New England Screw Co. v. Bliven, 3 Blatchf., 240, 243;
Loring v. Marsh, 2 Clifford, 311, 323;
White v. Whitman, 1 Custis, 494;
Wadleigh v. Veazie, 3 Sumner, 165;

Payne v. Hook, 7 Wallace, 425;
Latham v. Chafee, U. S. Circ. Ct. for R. I., 7 Fed. Rep., 520;

It is alleged in the bill that the Ellis suit in the Supreme Judicial Court of Massachusetts, has "never "proceeded to a final determination and decree by "said court, and is now pending therein, so that no "final adjudication has been made of the pretended "rights of the parties thereto." (page 20 of the Record).

It is a contradiction in terms to affirm of a suit *sub judice* that it is *res adjudicata*..

No question becomes *res adjudicata*, until it is settled by *final judgment*.

Sharon v. Hill, 26 Fed. Rep. 337, 389, 391;
Freeman on Judgments, § 251.

A decree in its nature intermediate and interlocutory, even thongh it decide something—as every decree must, of whatever nature—until it definitively settles, determines, and concludes the controversy, cannot operate an estoppel.

For these reasons as herein set forth, we submit that we are not bound or barred by the proceeding or decree in the Ellis suit.

V. In that it held the proceedings and decree in Bankruptcy in the District Court of Massachusetts valid and regular and binding upon these appellants, and the decree therein a bar to this suit.

We are not bound or barred by these proceedings and decree.

1. Because the whole proceeding from beginning to end, was collusive and fraudulent, and the decree, in consequence, a mere nullity.
2. Because we were not parties to the proceeding.
3. Because of a defect of jurisdiction.

In respect of these proceedings in bankruptcy, by which it is contended that we are barred and foreclosed of any right to maintain this suit, we charge that they were collusive and fraudulent, and that, in consequence, the decree did not vest the assignee with the right to maintain the suit, nor did it operate to divest the title of the railroad company.

In impeachment of the validity of the adjudication in bankruptcy, the bill alleges that the petitioner Adams, was not in fact a creditor of the Boston, Hartford and Erie Railroad Company, but that, in pursuance and furtherance of a corrupt conspiracy between the petitioner and the president of the road, and others, the petitioner was falsely made to simulate the character of such a creditor; that the Board of Directors of the road, by a regular vote, authorized and instructed the president, as the executive officer of the corporation, to oppose the proceeding in bankruptcy, and to resist an adjudication therein against the company; that, in pretended and apparent compliance with this authority and instruction, the president

Lane, retained the Hon. Benjamin R. Curtis, a lawyer of distinguished eminence in whom the corporation had confidence, as the attorney for the company in these proceedings, instructing him to resist and, if possible, defeat an adjudication against the company; that subsequently, in evasion and violation of the authority and instruction given him by the corporation, and in furtherance of the corrupt conspiracy charged, Lane employed his own personal attorney to represent the company in the bankruptcy proceedings, and instructed him to procure, by consent, an adjudication of bankruptcy against the company; that accordingly such consent was given, and thereupon, and not upon any proof of the facts essential to a valid adjudication of bankruptcy, the company was adjudged a bankrupt; that all the acts of the president Lane, toward and tending to the adjudication of bankruptcy, were studiously concealed from the directors and stockholders of the company, and were designed and done by Lane, as president, for the consummation of the corrupt conspiracy into which he had covinously entered to divest the company of which he was the executive head, of its property and possessions.

From this predicament of fact, the truth of which is, for the purpose of this demurrer, admitted, it results that the adjudication of bankruptcy against the company was obtained by collusion between Lane, the president of the company, and Adams, the pretended petitioner in bankruptcy, and that, in taking the proceedings and in obtaining the decree, these pretended litigants practiced a fraud and an imposition upon the Bankruptcy Court; that in legal effect there never was herein any valid litigation in the Bankruptcy Court, and hence no binding and valid decree of bankruptcy, and therefore, of necessity, that all the incidents of this pretended and fraudulent decree, includ-

ing particularly the transfer of the property of the company to the assignees in bankruptcy and its ultimate transfer thereby to the New York and New England Railroad Company, are frustrate and ineffectual.

Upon this state of fact the only question of law that can here arise is whether it be competent for these appellants in this suit to challenge the validity and avoid the effect of this decree. This question we have considered fully in arguing the following assignment of error, [pp. 73-83 *infra*,] and it is therefore omitted here.

The argument made under the preceding assignment of error, in considering the legal effect of the Ellis suit as affecting, these appellants, to the point that a judgment or decree in a suit not a real controversy is void and of no effect to bind any one, not party to the fraud, and is moreover in contempt of court (pp.59-62, *supra*), applies to the full extent to this pretended and collusive proceeding in bankruptcy. Here as in the Ellis suit, there was no controversy, no opposing interest, the same set of persons were both plaintiffs and defendants, and the decree entered by consent was according to the real interest of both the parties and contrary to the interests of all persons concerned, except the parties to the fraud. The Bankruptcy Court was imposed upon, and induced to make a decree in ignorance of the real state of things, which decree was in fraud of our rights. Lane was *dominus litis* in this proceeding, just as he was in the Ellis suit, and for the same covinous purpose, and with the same result. It was all a part and parcel of the conspiracy to rob the stockholders, and to enrich, by the robbery, under the forms of law, the perpetrators of the iniquity.

"In the eye of the law fraud spoils everything it 'touches. The broad seal of the Commonwealth is "crumbled into dust as against the interest designed

"to be defrauded. Every transaction of life between "individuals in which it mingles is corrupted by its con- "tagion. Why then should it find shelter in the de- "cree of courts. *There* is the last place on earth "where it ought to find refuge. But it is not protected "by record, judgment, or decree. Whenever and where- "ever it is detected, its disguises fall from around it, "and the lurking spirit of mischief, as if touched by "the spear of Ithuriel, stands exposed to the rebuke "and condemnation of the law."

Mitchell v. Kintzer, 5 Penn St., 216, 217.

But again, as in the Ellis suit, these appellants were not parties to the proceeding in bankruptcy, and hence are not bound by it, and may attack it here or elsewhere. The argument to this point under the previous assignment of error suffices here, and need not be repeated. (*Vide* pp. 57-59 *Supra*) Upon this point, the Ellis suit and the bankruptcy proceedings are identical. We were not party to the Ellis suit; neither were we parties to the pretended proceeding in bankruptcy, and hence, we are not bound or barred by the decree.

But finally, the adjudication of bankruptcy which we seek to impeach is vitiated by a still more radical and essential infirmity; namely, by a defect of jurisdiction—an infirmity which avoids it everywhere, always and against everybody, whether parties or strangers.

The case of the Marshalsea, 10 Coke, 68, 76;
Pennoyer v. Neff, 95 U. S., 714.

The existence of a debt due from the respondent to the petitioner is an indispensable condition to the

institution of a proceeding in bankruptcy—that is to say, it is a jurisditional fact.

Bankruptcy Act, 1867, §§ 11, 39;
Sonneborn v. Stewart, 2 Wood, 599;
McCormick v. Pickering, 4 N. Y., 276;
In re Western S. & T. Co., 13 Pac. L. R., 66;
Re Busch, 10 Bank, Reg., 150;
Re Rosenfields, 11 id., 86;
Perkin v. Proctor, 2 Wilson, (Eng.) 382.

It is a concession of record that the petitioner was not a creditor, but that he falsely personated the character of a creditor for purposes of fraud and imposition.

This raises the question whether the fact that an adjudication of bankruptcy was obtained upon a fictitious and pretended debt be available, in collateral proceedings, to impugn and avoid the decree for want of jurisdiction. Inasmuch as this is not precisely the same thing, as the question whether this adjudication, and the adjudication in the Ellis suit, can, on general principles be impeached collaterally in this suit, aquestion fully considered hereafter, [pp. 73-83, *infra*. we may properly discuss it at this place.

Upon this point then, we remark that the Federal District Courts, though not inferior tribunals, are yet statutory courts of limited and prescribed jurisdiction.

McCormick v. Sullivant, 10 Wheat, 192;
Ex parte Watkins, 3 Peters, 193;
Kennedy v. Georgia State Bank, 8 How. 586.

They, therefore, obviously proceed not according to the course of the Common Law.

Moore v. Presby, 25 N. H., 299.

When superior courts act by virtue of a special statutory authority their proceedings stand on the same footing as those of courts of limited and inferior jurisdiction.

Williamson v. Berry, 8 How. 495;
Williamson v. Irish Presbyterian Congregation, 8 id, 565;
Williamson v. Ball, 8 id, 566;
Webster v. Reid, 11 id, 437;
Denning v Corwin, 11 Wend, 648;
In the matter of Flatbush Avenue, 1 Barb., 286;
Embury v. Conner, 3 N. Y. 511;
Mayhew v. Davis, 4 McLean, 213;
Thatcher v. Powell, 6 Wheat, 119;
Boswell v. Otis, 9 How. 336.

The decrees of the District Courts are, therefore, voidable collaterally for want of jurisdiction by parol evidence contradictory of the record.

Moore v. Presby, 25 N. H., 299.
Clark v. Holmes, 1 Douglass, (Mich,) 390.
Borden v. Fitch, 15 Johns, 121.
Harrington v. The People, 6 Barb. 607;
Noyes v. Butler, 6 id. 613;
Brown v. Foster, 6 R. I., 564, 578.
Denning v. Corwin, 11 Wend, 648;
Wise v. Withers, 3 Cranch, 331;
Holyoke v. Hoskins, 22 Mass.. 20;
Tyler v. Pomeroy, 90 id. 480, 484.

Sears v. Terry, 26 Conn., 273.
Luther v. Borden, 7 How. 1, 61;
Dynes v. Hoover, 20 id. 65.

Hence an adjudication in bankruptcy is not conclusive of a jurisdictional fact.

Stiles v. Lay, 9 Ala. 795;
In re Goodfellow, 3 Bank Reg., 452,
s. c. 1 Lowell, 510;
In re Penn., 3 Bank, Reg., 582.

In Goodfellow's case, *supra*, Judge Lowell said: "Upon a fact which goes to defeat the "jurisdiction over the supposed bankrupt," the record is not conclusive evidence, "and such a "fact as that may be shown by plea or proof "in any court, by a person not estopped to show it." The record of even a superior court of general common law jurisdiction may be contradicted, and its judgments avoided by extrinsic evidence in disproof of jurisdiction in the particular case. This is the rule of the Supreme Court of the United States. "The juris- "diction" said the court in the case of Williamson v. Berry, [8 How. 495,540,] "of any court exercising "authority over a subject may be inquired into by "every court when the proceedings of the former are "relied upon, and brought before the latter by a party "claiming the benefit of such proceedings" and "the "rule prevails whether the decree or judgment has "been given in a court of Admiralty, Chancery, Ec- "clesiastical or court of common law, or whether the "point has risen under the law of nations, the practice "in Chancery or the municipal laws of the states."

And again by the same court in another case it is said, "Where a court has jurisdiction it has a right to "decide every question which occurs in the case, and

"whether its decision be correct or otherwise, its "judgment, until reversed, is regarded as binding in "every other court. But if it acts without authority "its judgments and orders are regarded as nullities. "They are not voidable but simply void." Elliott v. Peirsol, 1 Peters, 328, 340.

"If it is once conceded that the validity of a "judgment may be attacked collaterally by evi- "dence showing that the court had no jurisdiction, "it is not perceived how any allegation contained "in the record, however strongly made, can af- "fect the right to question it. The very object of "the evidence is to invalidate the paper as a record. "If that can be successfully done no statements therein "have any force." Thompson v. Whitman, 18 Wall. 457. And on page 467 in this same case, the court says, "In a number of cases in which was questioned "the jurisdiction of a court, whether of the same or "another state, this court has maintained the same "language."

In New York it is said that "The jurisdiction of a "court, whether of general or limited jurisdiction, may "be inquired into, although the record of the judg- "ment states facts giving jurisdiction." Harrington v. the People, 6 Barb. 607, and again, by the same court, it is said, "No court can acquire jurisdiction "by a false assertion of facts on which jurisdiction "depends. No statements in a record will conclude "parties as to any jurisdictional fact." Noyes v. Butler, 6 Barb. 613.

This is assumed to be the rule everywhere, and a doctrine beyond controversy by the Supreme Court of the United States, in the opinion in the case of McGoon v. Scales. 9 Wall, 23, 30, wherein it is said "The "doctrine of this court and of all the courts of this

"country, is firmly established, that if the court in "which the proceedings took place *had jurisdiction* "to render the judgment which it did, no error in its "proceedings *which did not affect the jurisdiction* will "render the proceedings void.

To the same effect see also:—

Knowles v. Gas Light & Coke Co. 19 Wall, 58, 61;
D'Arcy v. Ketchum, 11 How. 165;
Webster v. Reid, 11 id. 437;
Harris v. Hardeman, 14 id. 334;
Shriver v. Lynn, 2 id. 43, 59;
The Chemung Canal Bank v. Judson, 8 N. Y., 254;
Sears v. Terry, 26 Conn. 273;
Campbell v. Corwin, 7 Miss, 106.

The record recital of jurisdictional facts is only *prima facie* evidence.

Comstock v. Crawford, 3 Wall, 396.

We conclude, therefore, that if the decree in question be in a *voluntary proceeding*—which in fact it must be assumed to have been—it is void for lack of authority to institute the proceeding.

Bankruptcy Act, 1867 § 37.
New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656.

and if it be a decree in an *involuntary proceeding* then the adjudication of bankruptcy is void upon the concession that the petitioner was not a creditor.

VI. In that it denied to the appellants the right to impeach these adjudications for fraud in this suit.

It is elementary learning that the judgment of any court may be impeached by strangers to it for fraud or collusion.

2 Phillips on Evidence, (4 Am. Ed.,) 95, Note 291;
Freeman on Judgments, § 334;
Dutchess of Kingston's Case, 11 St. Tr. 261, s. c. 2 Smith's Leading Cases, 8th Ed. 734, and the note.
Fermor's Case, 3 Rep. 77.
Twyne's Case, Id. 80.

By the term "strangers" herein we are to understand, not persons wholly disconnected with the matter in litigation, that is persons who have nothing whatever to do with the case, but persons who have real pecuniary interest in the dispute, whose interests are directly affected by the judgment, but who, not having been technically parties of record, had no opportunity to be heard, could not technically "appear," nor, according to the rules of practice, interpose a defense or take an appeal. In defining the class of persons understood by the term *strangers* Mr. Freeman, in his learned treatise on Judgments, says:—

"It must not however be understood that *all* strangers are entitled to impeach a judgment. It is only "those strangers who, if the judgment were given full "credit and effect, would be prejudiced in regard to "some pre-existing right, that are permitted to impeach "the judgment. Being neither parties to the action, "nor entitled to manage the cause, nor appeal from "the judgment, they are, by law, allowed to impeach it,

"whenever it is attempted to be enforced against "them."

Freeman on Judgments, § 335.

This we believe to be our case. These actions were brought, not against the shareholders individually nor, *eo nomine*, as a corporate body, but against the corporation, as a distinct and independent entity. We were not served with process in either action. We were not entitled to defend the suit in either case, nor to manage the cause, nor can we appeal from the judgment or the decree. The directors who were our agents in the premises, so far as they permitted these suits to be brought, or to terminate as they did, acted *ultra vires*, and in plain breach of their trust. It was their duty to protect the property of the corporation, to defend any suit brought against it, in good faith, to resist any attempt to squander the assets, and to expose any fraud affecting our interests.

In each of these particulars they failed in their duty. Judgments which they were bound to prevent, were rendered against the company, and decrees were made in fraud of our rights, and our property to the amount of many millions was taken from us under the form of a judgment of a court of law and by a decree in bankruptcy.

We have called upon these directors, our agents and trustees for us of the property of the corporation, to bring this action to undo these wrongs and to recover the property. Upon their failure and refusal to do so, we have commenced this suit ourselves. This we had a plain right to do in a court of Equity. It is settled law, both here and in England, that shareholders under these circumstances may bring such an action as this.

Foss v. Harbottle, 2 Hare, 461 ;

Dodge v. Woolsey, 18 How, 331 ;
Memphis City v. Dean, 8 Wall 64, 73 ;
Hawes v. Oakland, 104 U. S. 450 ;
Detroit v. Dean, 106 U.S. 537 ;
Dimpfell v. Ohio etc. R. R. Co., 110 U. S. 209.

And *particularly*

County of Tazewell v. Farmers' Loan & Trust Co. (by Harlan, J.) 12 Fed. Rep , 752.
Taylor on Corp., § § 139, 140, 141.

The Court below, in overruling the demurrer for want of jurisdiction, concedes our right to bring this suit. It is a proper proceeding under the circumstances. We are here as of right because the corporation, as a corporation, has betrayed its trust, and because no other door is now open to us whereby we may attempt the recovery of our property.

Whenever a judgment or decree is procured through the fraud of either of the parties to the action, or by the collusion of them both, for the purpose of defrauding some third person, he may escape from the injury thus attempted, by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained; so much is conceded. We have already endeavored to show that these appellants are such third persons, or strangers, as this rule contemplates ; that they were not in such a sense parties to these suits that they should be refused the right to impeach the result of the suits. Even if they were in some sense parties to these proceedings they were not properly before the court. They were not properly represented. No one, in either of these proceedings, stood for their interest; so far as they were represented they were defrauded and misrepresented. They could not appear in person, or by attorney. They could

not be heard. They cannot sue out a writ of error or take an appeal. They are remediless except in such a proceeding as this.

"It is a general and established rule," says the Supreme Judicial Court of Massachusetts, "that "when a party's right may be collaterally affected by a "judgment, which for any cause is erroneous and void, "*but which he cannot bring a writ of error to reverse*, he "may, without reversing it, prove it was erroneous and "void, in any suit in which its validity is brought in "question." Vose v. Morton, 4 Cush, 27.

In the case of Campbell v. Railroad Co., 1 Woods, 368, it is held that, where the trustees of a mortgage of railway property are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by the mortgage as if they had been made parties, *unless they can show some fraud practised upon, or connived at by the trustees themselves*, and that, when the trustees were made parties defendant to a bill to foreclose the mortgage, filed by certain of the bondholders, and allowed a decree to be taken by default, such supineness was a constructive fraud against the bondholders whom they represented, and hence that the bondholder's action would lie.

In Webster v. Reid, 11 How., 437, it was held by this Court, that a judgment of the Supreme Court of Iowa might be attacked collaterally, even by a party to the action, where there was no personal notice and for fraud. In the opinion McLean, J. said, by way of conclusion: "When a judgment is brought collaterally "before the court as evidence, it may be shown to be "void upon its face, by a want of notice to the person "against whom judgment was entered, *or for fraud*."

See also

Brooklyn v. Insurance Co., 99 U. S., 362;

Empire v. Darlington, 101 U. S. 87;
Pana v. Bowles, 107 U. S. 529;
Carpenter v. Hart, 5 Cal. 406;
Kerr on Frauds (2d Eng. Edition, 1883,) 326-328.

The question being whether the appellant may impeach the judgment in the Ellis suit in this proceeding, it may be remarked that, while the courts of the United States are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and the judgments of a state court are, therefore, practically foreign judgments in a court of the United States. This is declared in the case of Pennoyer v. Neff, 95 U. S., 714, 733. It is there said that the Federal Courts "are bound to give to the "judgments of the state courts only the same faith "and credit which the courts of another state are "bound to give to them," which is to say, that such judgments are entitled, in the courts of the United States, only to the faith and credit of foreign judgments, inasmuch as that is what is accorded them in any sister state. We are, therefore, as to this branch of our contention, within the rule as to foreign judgments, as stated in Kerr on Frauds (*supra*), "A "foreign judgment can be impeached if it be made "to appear that it was fraudulently obtained. When "a question between the parties has been decided by a "foreign court, with jurisdiction, that decision is, as a "general rule, conclusive, and cannot be opened on the "merits but, if the foreign judgment was obtained by "fraud, that would be an answer to any proceeding "founded on the judgment" citing, in support of this proposition:—

Bank of Australasia v. Nias, 16, Q B, 717;
Ochsenbein v. Popelier, 8 Ch., 700;

Messina v. Petrochino, L. R., 4 P. C., 144;
Abouloff v. Oppenheim, 52 L. J., Q B. 1.

"A judgment by consent," continues the same learned writer, "is binding, but if it appears that the consent "was obtained by fraud the court will treat the con- "sent as a nullity. (Stannard v. Harrison, 19 W. R., "812). So also if it be made to appear that a judges "order has been obtained by fraud, or by the suppres- "sion of information which it was essential the court "should know, the order will be set aside." Ex parte Cockerell, 4 C. P. D., 39, per Lord Coleridge;

Kerr on Frauds (3d London Ed., 1883), 327, 328.
See also Pell v. January, 35 Ark., 331, in which the question of the collateral impeachment of fraudulent judgments is fully and learnedly considered.

This too is the doctrine in the Dutchess of Kingston's case, [20 St. Tr., 478 s c 2 Smith's Leading Cases 8th Ed., 734, and the note], wherein the Lord Chief Justice De Grey, said:—"Fraud is an extrinsic, collateral act, "which vitiates the most solemn proceedings of courts "of justice. Lord Coke says; 'It avoids all judicial acts, ecclesiastical and temporal.'"

See also Shedden v. Patrick, 1 Macq, 535.

But again in each of the actions the judgments in which we attack, it is our contention that there was no jurisdiction. To give a court jurisdiction, as we have seen, there must be a debt due, and a real contention or controversy between plaintiff and defendant. In neither of these actions was there either an honest debt or a real dispute—hence there was no jurisdiction; and

we may, therefore, *even if this suit be held to be a controversy between the same parties,* attack the judgments upon allegation and proof *aliunde* of defective jurisdiction.

Bryan v. Kennett, 113 U. S., 179.

In this case it is plainly declared that where there is no jurisdiction the questions involved in the determination of the suit are open to examination collaterally. In the opinion Harlan J, says: "It" [the judgment sought to be impeached], "is not subject to col-"lateral attack, *because there is nothing on the face of "the record which shows any want of jurisdiction in the Court that rendered it.*" From which the necessary inference, is that, whenever it appears that there was a want of jurisdiction in the Court that rendered the judgment, such judgment may be collaterally attacked upon that very ground in a court of the United States.

See also as in point, Windsor v. McVeigh, 93 U. S., 274;
Hale v. Fitch, 104 U. S., 261;
Robbins v. Chicago, 4 Wall., 657;
Corcoran v. Chespeake Canal Co., 94 U. S., 741;
Greene v. Green, 68 Mass., 361;
Sidensparker v. Sidensparker, 51 Me., 481;
Freeman on Judgments, §§ 334-337;
Bests' Evidence, § 595.

Whatever may be the rule elsewhere, and even though it may be held that these appellants were technically parties to each of the suits which we attack, it is the settled rule of this Court that a bill may be maintained in a court of the United States, to set aside for fraud a decree of another court, by one who, even

though a party to the record and to the proceedings, was not a party to the fraud, and was injured by it.

Johnson v. Waters, 111 U. S., 640, is a case in point.

Therein it was held in this Court, that a Circuit Court of the United States has jurisdiction, in equity, of proceedings under a bill, filed by a creditor of the estate of a deceased person, to set aside, for fraud, a sale of the real estate of the deceased which was made and confirmed by order of a state court having competent jusisdiction, when the inquiry is, not into irregularities of proceeding in the state court, but into actual fraud in obtaining the judgment, or decree of sale and confirmation ; and that a creditor of the estate may maintain an independent suit in equity in a court of the United States, to set aside for fraud a sale of the real estate of a deceased person made under order of a state court, though he was a party to the proceedings, if he was no party to the fraud, and was ignorant of it until after the sale and confirmation, and no question as to fraud was before the court which confirmed the sale and passed upon the executor's accounts.

Mr. Justice Bradley, in the opinion, after declaring that " the sale was a sheer fraud as against the general " creditors of the estate," said :—

" The next question is whether the complainant is in " a situation to contest the validity of the sale by the " present suit. It is contended that he is concluded by " the proceedings in the Probate Court of Carroll Parish " which is alleged to have had exclusive jurisdiction " of the subject matter, and its decision is alleged to be " conclusive against all the world, but especially against " the complainant, who was a party to the proceedings.

" The administration of General Morgan's succession " undoubtedly properly belonged to the Probate Court " of the Parish of Carroll, and in a general sense it is

" true that the decisions of that court in the matter of
" the succession are conclusive and binding, especially
" upon those who were parties. But this is not uni-
" versally true. The most solemn transactions and judg-
" ments may, at the instance of the parties, be set aside
" or rendered inoperative for fraud. The fact of being
" a party does not estop a person from obtaining, in a
" Court of Equity, relief against fraud. *It is generally*
" *parties that are the victims of fraud.* The Court of
" Chancery is always open to hear complaints against
" it, whether committed *in pais*, or by means of judicial
" proceedings. In such cases the court does not act
" as a court of review, nor does it inquire into any ir-
" regularities, or errors of proceedings in another court,
" but it will scrutinize the conduct of the parties, and
" if it finds that they have been guilty of fraud in ob-
" taining a judgment or decree, it will deprive them of
" the benefit of it, and of any inequitable advantage
" which they have derived under it. Story's Eq. Jur.,
" §§ 1570-1573. Kerr on Fraud and Mistake 352, 353.
" This subject was discussed in Gaines v. Fuentes, 92
" U. S. 10, and Barrow v. Hunton, 99 U. S. 80. In the
"latter case, speaking of the proceeding in the Louisi-
"ana practice, to procure nullity of a judgment, we
"said, 'If the proceeding is merely tantamount to the
" 'common law practice of moving to set aside a judg-
" 'ment for irregularity, or to a writ of error, or to a
" 'bill of review on appeal, it would belong to the lat-
" ter category, (that is a supplementary proceeding
" 'connected with the original suit) and the United
" 'States Court could not properly entertain jurisdic-
" 'tion of the case. * * * * *
" 'On the other hand if the proceedings are tantamount
" 'to a bill in Equity to set aside a decree for fraud in
" 'the obtaining thereof, then they constitute an origi-
" 'nal and independent proceeding; * * * * a
" 'new case arising upon new facts, although having
" 'relation to the validity of an actual judgment, or

"'decree,' etc. These considerations apply with full "force to the argument based on the monition proceed- "ings, which were resorted to after the sale. * * *

"In the case of Jackson v. Ludeling, 21 Wall, 616. "we held that the judgment of confirmation or homol- "ogation, on such a monition, has relation only to mis- "takes and omissions of the officers of the law, and "not to the question whether the purchasers obtained "their title by fraud, or were trustees *mala fide* for "others, and that such a judgment is conclusive of "nothing, but that there have been no fatal irregulari- "ties of form. The concluding remarks of the opinion "in that case have a strong bearing upon the present. "It is there said :—

"'A sale may have been conducted legally in all its "'process and forms, and yet the purchaser may have "'been guilty of fraud, or hold the property as a trus- "'tee. In this case the complainants rely upon no "'irregularity of proceeding, upon no absence of form. "'The forms of law were scrupulously observed, but "'they rely upon faithlessness to trusts and common "'obligations, upon combinations against the policy of "'the law and fraudulent, and upon confederate and "'successful efforts to deprive them wrongfully of pro- "'perty in which they had a large interest, for the "'benefit of persons in whom they had a right to place "'confidence. Homologation is no obstacle to such a "'claim.'

"In our judgment it is equally no obstacle to the "claim of the complainant in the case before us. The "same observation may be made with regard to the "proceedings had in reference to the executor's final "account and discharge.

"Had the question of fraud been before the Probate "Court in any of these proceedings, and had the com- "plainant been apprised of them the case might have "been different. This Court would not try over again "a case already tried, nor permit the complainant to liti-

"gate matters which he had notice of, and which he had "an opportunity to litigate in the probate proceedings. "But one of the grounds of complaint made by the "bill is that the very attorneys whom he had employed "to secure his claim acted as attorney for the succes- "sion and heirs, and conducted the proceedings for "the sale, and participated as active parties therein, "without giving him any notice of what was being "done. * * * * * We are clearly "of opinion that the complainant is not precluded "from obtaining relief in the present suit."

Johnson v. Waters, 111 U. S., 640, 667, 668, 669, 672.

This, we respectfully insist, if the Court shall determine that these appellants were parties to the Ellis suit and the proceedings in bankruptcy, is our case. We were not, however, even in this view of the matter, parties to those suits in the plain, technical and indisputable manner in which the complainant in the case referred to above, was a party to the proceedings in the Probate Court. He was there party upon the record, employed counsel and conducted his own case, in his own way, with his eyes open. But these complainants, if parties at all, were parties only constructively and remotely and by an indirection, without the power to control the proceedings, or influence the result. If the complainant in that case was not precluded, much more every way have these appellants a standing in court and a right to claim relief in Chancery.

They have been injured in their property rights by these proceedings, and, even if they were parties to the proceedings, they were not parties to the fraud. They therefore reasonably claim to come within the rule declared in Johnson v. Waters, *supra*.

VII. In that it held the appellants barred by laches.

We urge that laches ought not to be imputed to these appellants in this suit upon the following grounds:

1. Because they are to be held barred herein by laches, if at all, only upon the facts that appear upon the face of the bill, and because it does not, from any allegations of the bill, appear that they were not diligent in pursuing their remedy, and does, on the contrary, appear therein affirmatively, that this suit was properly commenced within a reasonable time.

2. Because, when there is a discretion in a court of Equity to bar a right on the ground of delay in asserting it, the Court will be guided, at least by analogy, by the statute of limitations applicable to like actions at law, and because, in this view of the matter, the appellants come plainly within both the letter and the spirit of the statute.

3. Because, inasmuch as the fact that one of these appellants was an alien, and the other an infant prevents the statute from running at law until the disability of alienage and infancy is removed, a court of Equity will equally regard such disabilities as a sufficient answer to the imputation of laches.

4. Because, inasmuch as the directors and officers of the defendant corporation, and the trustees under the mortgage, were trustees of an express trust as toward the corporation, no

lapse of time will be held to bar an action of this nature against them.

5. Because—to revert to the technical sufficiency of the pleading—such facts are set out in the bill as plainly declare what were the impediments to an earlier prosecution of the suit ; how it happened that the appellants were ignorant of the fraud, and in general, why this suit was commenced at the time, and in the manner in which it was commenced.

Proceeding to a discussion of each of these grounds in order we remark, *first*, that in a suit of this nature, and upon a demurrer to the bill, it must be conceded, that if the appellants are to be barred by laches, facts from which the legal conclusion or presumption of laches may arise must plainly appear on the face of the bill.

The demurrer concedes the facts alleged in the pleading, hence upon those facts as there they appear must be predicated laches, if the position on this point of the court below is to be sustained.

Now, precisely what are those facts as they appear in the bill from which the presumption of laches was assumed to arise. It is declared in the bill that a certain fraud was concocted for the purpose of depriving the corporation of its property, and the shareholders of their stock ; that various steps were taken under the forms of law, looking toward the consummation of that fraudulent purpose, which, finally, was fully matured and consummated by the sequestration of the property and franchises of the respondent company, and the confiscation of the stock of the shareholders, at some time later than April, 17, 1873, (Record pp. 34, 35); that what was done in pursuance of the fraudulent purpose to deprive these appel-

lants of their property rights as shareholders, was done in a manner apparantly lawful and regular (Record *passim)*; that upon the face of these proceedings there was nothing, under all the circumstances, from which shareholders in general could have reasonably inferred that their interests were being fraudulently sacrificed ; that, consequently, the cause of action accruing to the corporation and the defrauded shareholders did not technically arise until such a time after April 17, 1873, as the fraudulent series of transactions had been completed andconcluded, and the injured parties had discovered the fraud practiced upon them; that the bill was filed July 8th, 1880, by one of these appellants, Graham (Record p. 1) and that the other appellant, Raymond, was joined as a party thereto by petition made by her November 20, 1880 (Record p. 69); that Graham was an alien, born in and a resident of Ireland, who had never at any time been in the United States (Record p. 2), and that Raymond, who was an infant until November 8, 1880, and a resident of Iowa, made petition to be admitted as party complainant to the bill within twelve days after arriving at her legal majority. (Record, pp. 68, 69).

These are the facts and all the facts which a reading of the bill will disclose as pertinent to the question of laches, and it is upon precisely this state of facts, and no other, that the Court is to pass in considering the question whether or not there was an unreasonable delay on the part of these appellants in commencing this suit. To recapitulate, we have a fraud secretly perpetrated, by trustees, under the forms of law, consummated and concluded after April, 1873, involving the ownership of many millions of property, divesting an alien and an infant of their rights of property as shareholders, the alien filing his bill for relief in July, 1880, and the infant praying to come in as party thereto twelve days after attaining her majority.

When an infant, twelve days after reaching the age of twenty-one, moves, in a proper and lawful manner, for the redress of an injury inflicted upon her during her infancy, there can be no serious contention that laches ought to be imputed to her. We may therefore, dismissing that branch of the question, proceed to consider the matter of Graham's diligence in the premises. And in the first place, we remark that under the circumstances the presumptions as to diligence are entirely in his favor. The burden of proof is upon the respondents to show that he has slept upon his rights, not upon him to show that he was diligent. Every fact disclosed by the allegations of the bill will serve to strengthen the legal presumption upon this point in his favor.

There was a secret fraud — a conspiracy — concocted by the directors and officers of a corporation in which Graham was a shareholder. This conspiracy was forwarded, and the fraud carried out under the forms of law. The judgments and decrees of courts of justice were procured as sanctions to what was done. Meetings were called, votes were made, and legislatures were called on to add their confirmatory acts. It was a time when railroads, not only in this country but in England and on the continent of Europe, were inevitably hurrying into insolvency. Graham had the right to trust these officers and directors, and the whole thing was made to have the appearance of inevitable necessity—and at the same time regularity and honesty. Graham lived in Ireland, remote from the *locus* of these transactions—and we submit that, even if he knew what was going on, from an outside point of view, there was nothing in it to put a prudent man, living as he lived, upon notice. Because values shrink, and mortgages are foreclosed it is not in every instance the only prudent thing to suspect fraud. And when the whole thing had been

fully and finally accomplished and concluded, it appears that, within a short time thereafter, Graham, having discovered the fraud, filed his bill for relief against it. There is nothing in the bill from which it is fair to infer that Graham knew of the fraud, or ought to have known of it, until within a reasonable time before the bill was filed.

Laches, in such a case as this, will be understood to mean unreasonable delay in seeking to enforce a right in equity. What shall constitute, in any given case, such unreasonable delay as to raise the presumption of laches is to be resolved by the sound discretion of the Court.

"A Court of Equity applies the rule of laches ac-
"cording to its own idea of right and justice. Every
"case is governed chiefly by its own circumstances.
"Whether the time the negligence has subsisted is suf-
"ficient to make it effectual is a question to be resolv-
"ed by the sound discretion of the Court."

Brown v. County of Buena Vista, 95 U. S., 157, 160.

See also to the same effect:—

Kerr on Frauds, (2d London Ed.) 340;
Wood on Limitations, §§ 58, 59, 60;
Pomeroy on Equity Juris, §§ 917, 965, and notes.
Harwood v. Railroad, 17 Wall, 81;
Twin Lick Oil Co. v. Marbury, 91 U. S., 591.

Conceding that the question of laches in this case is one which this Court will determine according to its sound direction, we urge that, upon the one hand, the facts concerning the entire transaction, recited in the bill and admitted by the demurrer, disclose a case of

such flagrant and enormous iniquity, while, on the other hand, the facts as to the reasonable diligence and promptness of the appellants, set out in the bill and admitted by the demurrer, so entirely fail to raise any presumption of laches that the discretion of a court of Equity ought not to be exercised to shield wrong doers and to deprive these appellants forever of any legal redress.

But again, upon our second point, it will be conceded that as a general rule, where there is a discretion to bar a right on the ground of laches, a court of Equity, will in the exercise of that discretion, particularly in cases of concurrent jurisdiction, use the statute of limitations as a rule to guide its action.

Coit v. Campbell, 82 N. Y., 509, 514 ;
Farnam v. Brooks, 9 Pick, 242 ;
Godden v. Kimmell, 99 U. S. 201, 210;
Preston v. Preston, 95, U. S. 200 ;
Badger v. Badger, 2 Wall, 87.
Meader v. Norton, 11 Wall, 442 ;
Bowman v. Wathen, 1 How. 188 ;
Beckford v. Wade, 17 Ves. 87 ;
Mitford's Equity Pleadings, 293, 318 ;
Angell on Limitiations, § 25-30 ;
Wood on Limitations, § 58, and many cases and illustrations in the note.

If then we turn to the Massachusetts statute of limitations in force when the bill herein was filed, we discover that, if our action had been at law, inasmuch as relief is sought against fraud, it might have been "commenced any time within six years after the person "entitled to bring the same, discovers that he has such "course of action."

Genl. Stat. of Mass (1860), ch. 155, § 12.

Six years then is the period within which such an action might be commenced at law—*i. e.* six years after the discovery of the fraud complained of.

Now there is nothing in the bill from which it is a fair inference that more than six years in all elapsed from the time of the final consummation of the wrong complained of in the bill, to the time the bill was filed. The wrong was completed, as the bill declares, some time after April 17th, 1873, and the bill was filed July 8th, 1880. It is by no means clear, on the face of the pleadings, therefore, that more than six years elapsed from the consummation of the fraud to the filing of the bill. Still less is there any reason to be certain, as for as the allegations of the bill are a guide, that six years elapsed from the time Graham discovered the fraud unt l he filed his bill.

If there were any evidence that he discovered the fraud immediately after its final consummation, he would still have a reasonable time thereafter, in which to prepare his case and file his bill, and a reasonable time under the circumstances of this case might be a year or two years, or five years, or more. It might be six years if the court will be guided by the statute, and if it might be six years (as plainly it might be), then upon the state of facts set out in the bill—if there were nothing else to say—we submit that there is not the smallest reason for imputing laches to Graham in the matter of commencing his suit. We insist that there is every reason to presume, as the case is exhibited in the bill, that the bill was filed within six years from the earliest moment at which the fraud can reasonably be presumed to have been discovered by a resident of Ireland.

Again, in the third place, and without regard to the sufficiency of the foregoing argument, we remark that

the Massachusetts statute expressly provides that infancy and absence from the United States are disabilities, and that persons within the age of twenty-one years, or absent from the country, who are entitled to bring such an action as this, may commence their action within the prescribed time after the disability is removed, that is after attaining to the age of twenty-one, or coming to the United States.

> Genl. Stat. of Mass., (1860), ch. 155, § 6.

This is another sufficient answer to the charge of laches. As to Graham the statute, operating by analogy, did not commence to run until he came to the United States. As long as he resided in Ireland it did not affect his remedy. A court of law was open to him until six years after he became resident of the United States. And as to the other appellant, who became party to the suit immediately upon coming of age, there can be no serious contention that laches are in anywise imputable to her.

> Sims v. Everhardt, 102 U. S. 300;
> Telegraph Co. v. Davenport, 97 id. 369.

It is the settled policy of a court of Chancery, and particularly of this court, sitting as a court of Equity, to protect to the utmost the rights of infants.

> Tucker v. Moreland, 10 Peters 58;
> Bank of the United States v. Ritchie, 8 id. 128.

The statute of limitations expressly excepts both of these appellants from its operation as long as the one is an alien and the other an infant. We submit, therefore, that, alike under the equitable statute of limita-

tions, and upon the general principles of equity jurisprudence, the court below erred in holding these appellants barred by laches.

Irrespectively, however, of statutory provisions it is a principle of common law that "prescription does not run against a party who is unable to act." [Broom's Maxims, 903,] and here the infant, at least, was unable to act.

In the fourth place, again, upon the other and independent ground that as against an express trust no statute of limitations, either at law or in equity, is to be allowed to run so as to bar an action, we contend that these appellants are not barred of their remedy in this proceeding. The directors and officers of the defendant corporation were, by their several appointments, constituted the trustees of an express trust. They were trustees not only for the corporation, *qua* corporation, but for the shareholders individually and as shareholders collectively.

It is a well settled rule of law, that the relation of officers and directors to the corporation is fiduciary; they are trustees and agents of the corporation and so derivatively of the stockholders. They occupy a position of the highest trust and confidence, and the utmost good faith is required of them in the exercise of their powers and functions.

Taylor on Corporations, § 692, and cases cited;
Green's Brice Ultra Vires, 477, 478, n. *a*;
Morawetz on Corporations, § 243.
Pomeroy's Equity Juris. §§ 1088-1090.
Pierce on Railroads, § 45, and cases cited.

Wood on Railways, § 150. pp. 359–377, wherein this question is very fully considered.
Baxter v. Moses, 77 Me. 465, s. c. 52 Am. Rep. 783;
European R. R. Co. v. Poor, 59 Me., 277.
Butts v. Wood, 38 Barb., 188,
s. c., 37 N. Y., 317;
Bent v. Priest, Sup. Ct. Mo., 25 Am. Law Reg. (N. S.), 115, Feby. No. 1886, and the note, pp. 125–133, in which the question is exhaustively discussed and many cases collected.

"Persons who become directors of a corporation," said Romilly, M. R., in the case of The York & Midland Ry. Co. v. Hudson (6 Beav, 99), "place themselves "in the situation of trustees, and the relation of trus- "tee and *cestui que trust* is thereby created between "them and the stockholders."

And accordingly, as trustees and agents of the corporation and of the shareholders, they are subject to the strict rules which govern the relation of trustee and *cestui que trust*, in all their dealings as directors or officers of the corporation.

Wardell v. Railroad Co,, 103 U. S., 657, 658.

They must, as such directors or officers, exercise the highest good faith in executing their trust, they are strictly accountable for all losses occasioned by breach of, or culpable neglect of their duty, and must turn over and account for, to the *cestui que trust*, all profits realized from the trust property or office.

Goodin v. Cincinnati, etc., Canal Co., 18 Ohio St, 183.

2 Lindley on Partnership, 591 ;
Perry on Trusts. § 427 ;
Jackson v. Ludeling, 21 Wall, 625 ;
Bain v. Brown, 56 N. Y., 285 ;
Penn. R. R. Co's Appeal, 80 Penn. R. R. 265 ;
Barnes v. Brown, 80 N. Y., 527;
Wood on Railways, § 150, pp. 367 *et seq*,
and the learned note. 25 Am. Law Reg., 125, 126, 127.

They must especially account for all profits improperly made, for all moneys improperly received, and for losses occasioned by breaches of their trust.

Jackson v. Ludeling, 21 Wall., 616 ;
European R. R. Co. v. Poor, 59 Me., 277;
Wardell v. Railroad Co., 103 U. S., 651, 658 ;
The York, etc., Railway Co. v. Hudson, 16 Beav., 485 ;
Pomeroy v. Benton, 57 Mo., 531 ·
Gilman v. Kelly, 77 Ill., 426, 435 ;
and the note 25 Am. Law Reg., 125, 127, 128.

It is a well settled principle of equity that lapse of time will not bar a continuing and subsisting trust, such as that subsisting between directors and officers and the corporation. In such case the Statutes of Limitations are inapplicable. Where there is a continuing express trust, created by act of the parties, no time is a bar, for the reason that, from the privity existing between the parties, the possession of the one is the possession of the other, and there is no adverse title. This is equally the rule here and in England.

Cholmondeley v. Clinton. 4 Bligh, 1 ;
s. c. 2 Merivale, 369 ;

Wedderburn v. Wedderburn, 2 Keen, 749; s. c. 4 Mylne & C., 41;
Attorney-General v. Fishmonger's Co., 5 Mylne & C., 16.
Stone v. Stone, L. R., 5 Chan. Ap., 74;
Woodhouse v. Woodhouse, L. R., 8 Eq., 514;
Bright v. Legerton, 29 Beav, 60;
Obee v. Bishop, 1 DeG., F. & J., 137;
Burdick v. Garrick, L. R., 5 Chan. Ap., 233;
Alden v. Gregory, 2 Eden., 280;
Prevost v. Gratz (by Story, J.), 5 Wheat., 481;
Boone v. Chiles, 10 Peters, 177;
Bank of U. S. v. Beverley, 1 How., 134;
Oliver v. Piatt, 3 Id., 333;
Seymour v. Freer, 8 Wall., 202, 218;
Lewis v. Hawkins, 23 Id., 119, 126;
Decouche v. Saventier, 3 John. Ch., 190, 216;
Kane v. Bloodgood, 7 Id., 90;
Carpenter v. Cushman, 105 Mass., 417;
Wood on Limitations, § 200;
Kerr on Frauds (2d London Ed.), 344, 345;
Pomeroy on Equity, §§ 419, 1080;
Perry on Trusts, 863, and a multitude of authorities in the note.

An agent, it is said, who stands in a fiduciary relation to his principal, cannot claim advantage of lapse of time.

Burdick v. Garrick, L. R., 5 Chan. Ap., 233.

"It is certainly true," said Mr. Justice Story, "that

"length of time is no bar to a trust—clearly estab-
"lished trust—and in cases where fraud is imputed and
"proved, length of time ought not, on principles of
"eternal justice, to be admitted to repel relief.

"On the other hand, it would seem that the length
"of time during which the fraud has been successfully
"concealed and practiced, is rather an aggravation of
"the offence, and calls more loudly upon a court of
"Equity to give ample and decisive relief."

Prevost v. Gratz, 6 Wheat. 481.

Again it is said, that, in order that lapse of time may not constitute a bar, the trust must be direct and exclusively cognisable in a court of Equity, and the question must arise directly between the trustee and the *cestui que trust*—conditions here fulfilled.

Story's Equity Jur., § 1520, *a*;
Pomeroy's Equity Jur., § 1083;
McCandless' Estate, 61 Penn. St. 9;
Philippi v. Philippe, 115 U. S., 151.

"The trusts," said the Supreme Court of Missouri,
"intended by a Court of Equity not to be reached or
"affected by the statute of limitations, are those tech-
"nical and continuing trusts which are not at all cog-
"nisable at law, but fall within the proper, peculiar and
"exclusive jurisdiction of Courts of Equity.

Johnson v. Smith's Admr., 27 Mo. 591;

See also,

Rogers v. Brown, 61 id., 187.
Ashhurst's Appeal, 60 Penn. St., 290;
Carr v. Thompson, 87 N. Y., 160.

This we suggest with deference is our case.

There is, in the relation between the officers and directors of this corporation and the corporation and the shareholders, every element required in such a trust as here designated.

Dickinson v. Teasdale, 1 DeG. J. & Sm. 52, by Lord Westbury.

The doctrine announced in the very recent case of Philippi v. Philippe, 115 U. S., 151, may be applied to the case at bar. It is there said to be the well settled rule of this Court, that, where there is an express trust, lapse of time is no bar to relief in Equity against the trustee, in favor of the *cestui que trust*, and that in such a case, when the trustee repudiates the trust, by word or deed, and such repudiation is brought fully and plainly to the knowledge of the beneficiary, in such a way that he is called upon to assert his equitable rights, the statute of limitations then commences to run, and that the beneficiary is not barred until twenty years from that time.

Conceding that under peculiar circumstances a Court of Equity will, in the absence of fraud or breach of trust, or when the parties had full knowledge, hold an action barred for laches within a much shorter time than that prescribed by the statute of limitations as a bar to an action at law, we urge that, on the other hand, it is also the rule that, when there are extenuating circumstances and conditions, as for example, infancy, coverture, absence, imposition or ignorance, a party may still maintain a suit in chancery for the redress of an injury long after the time prescribed by the statute at law. And we therefore submit, in view of this conceded elasticity of the rule in equity, that, upon plain principles of right, these directors and officers should not be heard in this Court to set up any prescription in bar of this suit. We may, under the rule declared in the case of Philippi v. Philippe, *supra*, pursue them to the ends

of the earth, and after any lapse of time short of twenty years after the full knowledge of their breach of trust is brought to us, and they are estopped conclusively from pleading our delay in bar of a suit to undo their wrong.

In the fifth place, as to the technical sufficiency of the pleading in the bill with reference to the question of fraud, the discovery of it by the appellants, etc., etc., it may be here remarked that such facts appear in the bill as plainly declare what were the impediments to an earlier prosecution of the suit, how it happened that the appellants were ignorant of the fraud, and, in general, why the suit was not commenced at an earlier date, and why it was brought in the manner and at the time in which it was commenced.

It appears, for example, in the bill that the fraud complained of was secret in its nature, that it was consummated under the forms of law, and that it was perpetrated by trustees in whom the appellants had a right to repose confidence. It is, therefore, a proper inference that there was nothing open and avert to put a prudent man on notice. The whole transaction was made to have the appearance of *bona fides*, and, even if these appellants had been present at the place where the iniquity was worked out, it is questionable whether any thing would have appeared to put them on notice. It was a well conceived and artfully managed transaction by which these appellants were defrauded of their property, and there was nothing notorious, or flagrant, or sufficient to shock or startle, in the steps taken to accomplish the end proposed. All this fully appears in the bill. It further appears that the appellant Graham was an alien, and a resident in Ireland. He was out of the country and so not presumed to have the information of one resident here. Absence of the party, in an action of this nature, from the place of the transaction, is expressly declared by Mr. Justice Miller, in the case of the Twin Lick

Oil Co. v. Marbury, 91 U. S., 591, in the absence of any statutory exemptions, to be an element of which the court will take notice in determining the question of diligence. It appears, finally, that Raymond was an infant, and so could not technically "discover" any thing, in a way to make a statute of limitations run against her, until her majority. Then she promptly joined in this action. The pleading goes into this as fully as possible. It is not required of a complainant that he do impossibilities. We must plead as fully as may be—as fully as the nature of the transactions involved reasonably admit. There must be certainty to a common intent. But the spirit of the rule in equity as to the pleading, we suggest, involves no more than a requirement that the fraud and its discovery, and the circumstances causing the delay, if any, in commencing the suit, he declared frankly, and fairly, and as fully and particularly as it may be practicable, and so fully and particularly, that the respondents may not be misled. This we submit that the bill herein accomplishes, and that the appellants are therefore entirely within the spirit of the rule on this point laid down in such cases as Badger v. Badger, 2 Wall, 87, and Wood v. Carpenter, 101 U. S., 140.

The equities between complainant and respondent in this suit are, we urge, by no means equal, and it is believed that this Court will be slow, by reason of any possible technical deficiency of a pleading, to hold the appellants barred of their action, thus obscuring and overlooking the paramount and substantial equities involved, and sacrificing essential interests to a point of practice.

Neither can it be urged against these appellants that their delay in filing the bill has availed by way of acquiescence to deprive them here of their right to sue. Acquiescence is not the same thing as laches. Pome-

roy's Equity, § 965. Mere delay is not acquiescence; mere suffering time to elapse is not equivalent to a deliberate surrender of a right. The true nature and effect of acquiescence is admirably stated in the opinion of Thesiger, L. J., in the case of DeBussche v. Alt. L. R., 8 Ch., Div. 286, 314. The suit was brought to set aside a sale made by an agent to himself in violation of his fiduciary duty. The Lord Justice said : —

"It still remains to be considered whether the plaintiff can be held to have, by his conduct, in any way precluded himself from taking the present proceedings. The term acquiescence which has been applied to his conduct is one which was said by Lord Cottenham, in Duke of Leeds v. Amherst (2 Phil. 117, 123) ought not to be used, in other words it does not accurately express any known legal defense, but if used at all it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it has been completed. If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by, in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term acquiescence, and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is committed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal

"considerations. A right of action was then vested "in him, which, at all events as a general rule, cannot "be divested without accord and satisfaction, or release "under seal. *Mere submission* to the injury for any "time short of the period limited by statute for the "enforcement of the right of action, cannot take away "such right, although under the name of *laches* it may "afford a ground for refusing relief under some pecu- "liar circumstances, and it is clear that even an express "promise by the person injured that he would not take "any legal proceedings to redress the injury done to "him could not, by itself, constitute a bar to such pro- "ceedings, for the promise would be without considera- "tion, and therefore not binding."

This is our case. The delay of this alien, and this infant in filing their bill was, in an equitable view of it, "mere submission," at the most to the injury. It was less in point of duration than the period limited by statute for the enforcement of their right of action, and hence cannot take away their right.

Upon the authority of so eminent a commentator as Mr. Pierce, it may be suggested that neither laches, nor even express acquiescence, will avail to bar a shareholder of redress for injury from an act *ultra vires*, and which is repugnant to public policy.

Pierce on Railroads, 518.

The whole proceeding by which the transfer of the property and franchises of the Boston, Hartford & Erie Railroad Company to the New York and New England Railroad Company, was, as we have endeavored to show, *ultra vires*, and contrary to public policy. Upon this point see Thomas v. Railroad Company, 101 U. S., 71, in which this doctrine is plainly declared. If then this be a sound rule of law, it offers

another reason why these appellants are not barred in this suit either by laches or acquiescence.

In Scovill v. Thayer, 105 U. S. 143, it was held that effect cannot be given to an act *ultra vires* by estoppel, recognition, or acquiescence.

In general, it will be found, in cases like the one at bar, where courts of Equity have held shareholders barred by laches when less than the full time allowed by the statute of limitation has elapsed, that the action was by, or on behalf of *bona fide* holders of bonds for value and without notice. A great number of cases might be cited in support of this proposition. But for the purpose of this argument, it is sufficient to suggest it, and to insist that the laches or acquiescence of a shareholder as against a *bona fide* purchaser of the bonds would be one thing, and such laches or acquiescence, as against the perpetrators of the fraud complained of, quite another thing. In this suit the rights of *bona fide* holders of the Berdell bonds, if there are any such persons, are not involved. The question now is as to the merits of the case between the defrauded shareholders and the perpetrators of the wrong. In a proper proceeding the rights of *bona fide* holders of these securities could, and would no doubt be protected, but for the present the rights of such persons are not in litigation.

> See Kent v. Quicksilver Mining Co., 78 N. Y., 159, and a multitude of authorities in the briefs of the Counsel and in the opinion.

It may be barely suggested here that, in the language of the Court of Appeals of New York, in the case of Cagwin v. the town of Hancock, 84, N. Y., 532, 542, "there can be no *bona fide* holder of bonds,

"within the meaning of the law applicable to negotiable "paper, which have been issued without authority."

Neither does it avail anything to say that we have an action for the redress of our wrongs at law and in the state courts, and that in consequence we have no standing here. The court below erred grievously in attempting to remit us to our remedy at law in the state courts.

Shelton v. Tiffin, 6 How. 163, 185 ;
Sullivan v. Portland etc. R. R. Co., 94 U. S. 806, 811 ;
Payne v. Hook, 7 Wall, 425.

VIII. In that, in deciding that the foreclosure suit and the bankruptcy proceedings were regular and valid, and the decrees therein binding on these appellants in consequence of such regularity and validity, it decided, in reality, a question of fact—and not a question of law—and in consequence, a question not proper to be passed upon on demurrer.

On demurrer of course questions of law only can be considered.

In the bill it is charged that both the Ellis suit in foreclosure and the proceeding of Adams in bankruptcy were in fraud of our rights. Facts are alleged and the circumstances under which these proceedings were had and the decrees therein obtained, are set out with particularity, and in such a way as to raise, by the pleadings, the question whether or not these proceedings were regular and lawful,

It is not possible that the court below, sitting as a court of Equity, could have intended to decide that, upon the facts as charged in the pleadings, these proceedings were lawful. We allege facts in the bill which, if sustainable by proof, are sufficient to establish, in any forum in which justice is administered, that our property was taken from us, under the form of these proceedings, in a manner grossly and enormously fraudulent. If the facts alleged plainly in our bill are true, or only partially true, those proceedings were fraudulent and iniquitous in a high degree. No other possible construction can in any wise be put upon the allegations of the bill. The court below, therefore, must be assumed to have decided, not that suits of the kind that we allege those suits to have been, and that the demurrer admits them to have been, are lawful and proper proceedings in courts of justice, but rather that these suits, *as they were in fact without any reference to the allegations of the bill or the admissions of the demurrer*, were lawful and proper. This was to decide the question of fact for us which it is our right to have tried. Upon that question we have a common law right to take proof and be heard.

We have raised the question of fraud and collusion in these proceedings in the proper way in the bill. We have set forth, in plain English and in full detail, facts and transactions which constitute a fraud and breach of trust, and not merely charged that the acts set forth are fraudulent. In other words we have pleaded facts, not conclusions of law, and have brought the allegations of the bill, as to the technical sufficiency of the pleading upon this point, within the rule of this Court, announced in the cases of Van Weel v. Winston, 115 U. S. 228, and Ambler v. Chateau, 107 U. S. 586, 590.

The question of fraud as to these proceedings is raised in the bill as a question of fact. It was, there-

fore, not competent for the learned judge below to pass upon it. If it was impossible to decide that these appellants were bound by those proceedings and decrees without passing upon the character of the proceedings, then the whole question was improperly considered. The judge on demurrer may not decide questions of fact, and if, in order to decide a question of law, it is necessary to decide preliminarily a question of fact, then that question of law cannot be raised on demurrer.

In a proper case, it is conceded, a court may decide, as matter of law, on demurrer, that a party is bound or not bound, by the decree of another court, That may be and usually is a question of law. But there can never be a case where it is proper for a court to decide on demurrer that legal proceedings in another court were lawful and regular, as a matter of fact, when in the bill facts are properly pleaded which, if those facts exist, settle the question the other way. And if the question whether a party is bound thereby, so far depends upon the question whether the proceedings were lawful and regular, that a just decision of the former question cannot be made until the latter is decided, then, in such a case, the question whether a party is bound cannot arise on demurrer, for the plain reason that to reach the question of law, the court must decide the question of fact.

For this reason, therefore, we submit that the court below erred in its judgment.

IX. In that it held these appellants not entitled to any relief.

If the mortgage of March 19, 1866, was in fraud of our rights; if the bonds secured by that mortgage were

converted, and the proceeds not honestly expended—every dollar thereof—in paying the debts of the corporation, and in increasing the value of the corporate property; if the proceedings to foreclose the mortgage in the Supreme Judicial Court of Masssachusetts were collusive and fraudulent; if the bankruptcy proceedings in the District Court of Massachusetts were fraudulent and without jurisdiction; if by this mortgage and these proceedings, we have been injured substantially in our property rights, and if we have commenced our suit within a reasonable time, under the circumstances, seeking redress in a court of Chancery, in a regular and proper manner, we respectfully urge that we are entitled to such relief as a court of Equity can give, and that the court below erred fatally in refusing even to hear us.

ROGER A. PRYOR,
Of Counsel for Appellants.

118-161

Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 232.

WILLIAM F. GRAHAM AND AMELIA TERESA RAYMOND,
Appellants,

v.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, et al.,
Appellees.

Appeal from a Judgment of the Circuit Court of the United States for the District of Massachusetts.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

ROGER A. PRYOR,
Of Counsel for the Appellants.

1886.
C. B. Merwin, Stationer and Printer, 218 Fulton St., N. Y.

converted, and the proceeds not honestly expended—every dollar thereof—in paying the debts of the corporation, and in increasing the value of the corporate property; if the proceedings to foreclose the mortgage in the Supreme Judicial Court of Masssachusetts were collusive and fraudulent; if the bankruptcy proceedings in the District Court of Massachusetts were fraudulent and without jurisdiction; if by this mortgage and these proceedings, we have been injured substantially in our property rights, and if we have commenced our suit within a reasonable time, under the circumstances, seeking redress in a court of Chancery, in a regular and proper manner, we respectfully urge that we are entitled to such relief as a court of Equity can give, and that the court below erred fatally in refusing even to hear us.

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C. B. Merwin, Stationer and Printer, 218 Fulton St., N. Y.

U. S. SUPREME COURT.

GRAHAM, et al.,

v.

BOSTON, HARTFORD and ERIE, R. R. Co., et al.

IF THE COURT PLEASE:

The subscriber respectfully begs leave to supply certain omissions, which, from the pressure of other engagements, occurred in the preparation of the brief heretofore submitted.

1.

Upon the point that the Act of 25th April, 1864, (Laws of New York, 1864, Ch. 385,) has not the operation, and effect to make the Boston, Hartford and Erie Railroad Company a New York corporation:

1

In the construction of this act, regard must be

had to the policy of the state touching the mode by which corporations shall be created.

By section 1, Art: VIII, of the constitution of New York, it is ordained that, "corporations may be formed under general laws; but shall not be created by special act, except * * * * * where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws."

Accordingly the legislature of New York has instituted by "general law," a complete system of incorporation for railroad companies. Act 2d April 1850, and Acts amendatory thereof. 3 Edward's Statutes, at Large 617-650.

But, the Act of 1864, is a "special Act;" and there being a "general law" under which the Boston, Hartford and Erie Railroad Company might have been organized as completely and effectually, as by virtue of the Act of 1864, the inference is irresistible, that "in the judgment of the legislature," passing that Act, "the objects of the corporation might have been attained under the General Law," and that so, the legislature did not intend, contrary to the prohibitition of the Constitution, to create a Corporation by the "special Act."

2

It is the settled doctrine of this court, that to the creation of corporate existence, a plain and unequivacal declaration of the legislative intent is indispensible. and that such existence cannot be created by implication.

Thus, in Central Railroad and Banking Company, v. Georgia 92 U. S. 665, 670, the Court, *per* Strong, J. say: "It may be that the consolidation of these corporations, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not, must depend upon the statutes under which the consolidation takes place, and the intention thereby manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule, that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it." Acc. Memphis R. R Co., v. Commissioners, 112 U. S. 618.

3.

From the principle here enunciated it results:

1st. That though the Act of 1864, is entitled an Act to *consolidate*, it is not a legitimate inference that the intention was to create a new corporation; because *first*, the operative words, and not the title of an act, determines its effect, and *second*, the term *consolidate* does not import *ex vi terminii*, the creation of corporate existence.

2d. The Act of 1864, conveys to the Connecticut corporation, the charter rights, franchises and property of the named New York corporations.

But *charter rights* does not involve necessarily an act of incorporation. The term *charter*

embraces any grant from the sovereign power to the whole people or a portion of the people, and applies as well to a deed as to an act of incorporation. 1 Bouvier Law Dict; *ad verb*; *Charter*.

Again, *corporate franchises* does not necessarily involve the right *to be a corporation*, but is an appropriate term to designate the powers and privileges incidental to particular classes of corporations. Thus, Matthews J. in Memphis R.R.Co. *v.* Commissioners 112, U. S., 619, said: "The essential properties of corporate existence are quite distinct from the franchises of a corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in, and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchises of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." Acc: N. O. &c., R. R. Co. vs. Delamore, 114, U. S., 508; Hall vs. Sullivan R. R. Co., 21 Law Reporter, 138. Wherefore, from the grant in the Act of 1864, of the corporate franchises of the New York corporations, it is not to be inferred that the legislature meant to transfer the franchise of the *corporation*, *i. e.*, the right to be a corporation.

4.

It will doubtless be contended that Clark vs.

Barnard, 108, U. S., 436, is decisive of the question in controversy.

1st: With great deference it is submitted that the conclusion of the learned Justice, page 440, is a *non sequitur*, and is quite irreconcilible with the doctrine of Central R. R. &c., vs. Georgia and Memphis R. R. Co., vs. Commissioners *supra*.

2nd. But, the operative words in the New York Act, are essentially different from the operative words in the Rhode Island Act; for, whereas the latter Act bestows "*all* the rights, privileges and powers," absolutely and without restriction, the conveyance by the former is only of what may be "a portion of their railway line and property," and of what is necessary "to consrtuct and operate a railway" in the state of New York, a grant and a necessity which are completely executed and satisfied by a transfer of property and the franchise to construct and operate a railroad, without passing the right to be a corporation i. e., without creating a new corporation.

3rd. Assuming, however, that the Act of 1864, be operative to pass and merge the corporate existence of the New York companies in the Connecticut company, the effect is that the Boston, Hartford and Erie Railroad Company is "constituted into two distinct corporate entities in the two states, acting in each according to the powers locally bestowed, as distinctly as though, they had nothing in common either as to

name, capital, or membership," so that in New York "it is exclusively a corporation of that state, subject to its laws and competent to do within its territory whatever its legislation may authorize." Clark vs. Barnard, 108 U. S. 452 ; Acc. Muller, vs. Dows, 94 U. S., 444 ; Matter of Sage 70, N. Y., 220.

Wherefore, the shareholders' meeting in the state of New York, was legal and valid only as a meeting of the New York corporation, and its action as a meeting of the Connecticut, Massechussetts and Rhode Island corporations, was illegal, invalid. and ineffectual to authorize a mortgage of *their* property.

II.

As to the pretended ratification of the meeting, and validation of the mortgage by legislative action.

1.

The rule is that, the legislature may validate an act or contract *ex post facto*, in a case in which it might have authorized the act or contract antecedently (St. Joseph Township vs. Rogers, 16 Wall., 644, 668; Anderson vs. Township, 6 Supr., R. 418),–the principle being that subsequent ratification is equivalent to prior authority. But where previous authorization would have been a

nullity, subsequent ratification is likewise and equally a nullity.

2

Now here:

1st. The legislature of the state in which the Boston, Hartford & Erie R. R. Company was a corporation had no power to authorize a corporate meeting beyond its jurisdiction; and, by consequence, it had no power to legalize and validate the meeting by subsequent sanction. And the vote of the meeting, if it were a nullity and ineffectual to authorize the mortgage, could not be validated by subsequent legislation; because that would be, by legislative act, to make a contract to which the corporation had never consented.

2d. Similarly, since the resolution of the meeting, though valid, only empowered the directors to make application for leave to mortgage, and not to give a mortgage; it results that a subsequent act of the legislature purporting to validate this mortgage, was, likewise, an attempt to bind the corporation by a contract to which it never consented.

ROGER A. PRYOR,
Of Counsel for Appellants.

118-161

APR 14 1886
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

October Term, 1885.

No. 282.

WILLIAM F. GRAHAM AND AMELIA TERESA RAYMOND, *Appellants.*

vs.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET AL. *Appellees.*

APPEAL

FROM A JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Supplemental Brief for the Appellants.

BENJ. F. BUTLER,

E. M. JOHNSON, OF COUNSEL.

BOSTON:
WHITCOMB, PRINTER, 383 WASHINGTON STREET.
1886.

SUPREME COURT OF THE UNITED STATES

October Term, 1885.

No 232.

WILLIAM F. GRAHAM AND AMELIA TERESA RAYMOND, *Appellants.*

vs.

THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, ET AL. *Appellees.*

APPELLANTS' SUPPLEMENTAL BRIEF.

Additional Statement of Facts.

The appellant Graham is an alien, a citizen of Great Britain, a stockholder of many years standing of the Boston, Hartford and Erie Railroad Company, who is, and was at the time of the several transactions mentioned in the bill, a resident of Inniskillen, in Ireland.

(Rec. p. 2.)

The bill is brought by Graham in behalf of himself and every stockholder and creditor of said Boston, Hartford and Erie Railroad Company who may join in the bill and contribute to the expenses thereof, after the officers and

directors of said Boston, Hartford and Erie Railroad have been duly requested to bring a suit, or take such legal proceedings as were necessary to secure to said Boston, Hartford and Erie Railroad Company and its stockholders and creditors the redress and relief sought in this bill, and the neglect and refusal of the officers and directors so to do.

(Rec. p. 3.)

The appellant Raymond becomes a party to the proceedings after the filing of the bill, by a petition filed December 13, 1880, setting forth that she has been a stockholder of the said Boston, Hartford and Erie Railroad since 1872, that she attained her majority on the 9th day of December, 1880, and that the transactions set forth in the bill occurred during her infancy and without her knowledge.

(Rec. pp. 68, 69.)

February 2d, 1864, said Boston, Hartford and Erie Railroad made a valid mortgage to the Treasurer of the State of Connecticut as trustee, to secure the payment of $4,500,000, principal and the interest, to be due on certain bonds to be issued under and secured by said mortgage.

(Rec. p. 6.)

The aggregate amount of all liens and mortgages upon the franchises and property of the railroad, before the mortgage known as the Berdell mortgage was executed, amounted to $9,904.650.

That said Berdell mortgage was made and authorized at a meeting of the stockholders in pursuance of some notice, the particulars of which your orator is ignorant, in the city of New York in the office of the Erie Railroad, whereof Robert H. Berdell, one of the trustees of said mortgage, was then president. That said Boston, Hartford and Erie Railroad was not a corporation of the State of New York, but a corporation created by the Statutes of Connecticut, Massachusetts and Rhode Island, and said meeting ought to have been held in one or all of said States and not in the State of New York. The said meeting was held in the State of New York, beyond the States in which said corporation was created, so that as few stockholders as possible, because of the distance from their homes, might attend said meeting, in order that the stockholders present representing or acting in the interest of the Erie Railroad might, by authorizing a mortgage of the franchises of the Boston, Hartford and Erie Railroad, raise a large sum of money, a portion of which should afterwards be diverted to the use of said Erie Railway, which was done as is charged in said bill to the extent of five millions of dollars. The complainant claims that by reason of the meeting being so held *for the purpose aforesaid and in the place aforesaid*, said meeting was illegal, and all acts and doings were null and void.

That after the execution of said mortgage of March 19, 1866, the trustees therein named accepted the trust imposed on them in and by said mortgage and entered upon the discharge of their duties thereunder.

That a portion of the bonds secured by the Berdell mortgage equal to the amount of underlying bonds and

mortgages were by the provisions of said Berdell mortgage to be returned in the hands of the trustees to be delivered up only on the cancellation of a corresponding amount of said underlying bonds.

(Rec. p. 46.)

That said Berdell, Davis and Gregory prior to the issue of said Berdell bonds, while they were trustees themselves, did ascertain the amount of bonds and notes underlying said Berdell mortgage to amount to over $9,000,000, and that over $9,000,000 of said Berdell mortgage bonds, if valid, were trust bonds in the hands of the trustees under said mortgage to be delivered to said railroad only upon the terms set forth in said mortgage.

That all of said 20,000 bonds were prepared for issue and signed by said Berdell, Davis and Gregory, as trustees, while they held the office of trustees as aforesaid, and were placed as well as those held in trust for underlying liens as those to be issued for the construction and equipment of said road in the sole possession of John S. Eldridge, president of the Boston, Hartford and Erie Railroad, so that said bonds required only the signature of said Eldridge as president, and the signature of the secretary of the company for the time being, to make them, if legally authorized, valid binding bonds in the hands of innocent third parties who might purchase the same. Eldridge was wholly insolvent and irresponsible, without means or property of his own, and he soon thereafterwards died and his estate was settled in insolvency.

(Rec. p. 26.)

That on or about February 27, 1867, said Berdell attempted to resign his trust by an instrument in writing of that date, signed by him and delivered to his associate trustees, Davis and Gregory.

(Rec. p. 11.)

That Eldridge and Berdell. conspiring together to have Eldridge appointed trustee under said Berdell mortgage, confederated and agreed that for the sum of $10,000, to be thereafterwards paid to said Berdell by said Eldridge, said Berdell should resign his trust as such trustee, so that said Eldridge should succeed him in said trust, and so that said Eldridge might get by his further action sole possession of said property bonds and trusts, and after said appointment said Eldridge paid said Berdell $10,000 out of the funds of said road, a portion of which funds had been raised by said Eldridge issuing and selling said Berdell bonds so held in trust.

That said pretended resignation of said Berdell was not accepted by the bondholders, and no action of any court or judge thereof was had, nor did said Berdell at any time render to any person, corporation or court any account of his acts and doings as such trustee, nor was he at any time relieved or discharged from the execution of the trust theretofore accepted and assumed by him under said mortgage.

That on or about October 28, 1867, said Gregory and Davis illegally attempted and pretended to appoint John S. Eldridge as trustee with them under said mortgage in place of said Berdell, said Eldridge then being president

corporation, of their acts and doings as trustees, nor were they ever relieved or discharged from the duties and obligations imposed upon them by the acceptance of said trust. That said Eldridge continued to be president and director of the Erie Railway until July 30, 1868, president and director of the Boston, Hartford and Erie Railway until December, 1869, and unlawfully assumed to be trustee under said Berdell mortgage, from Dec. 1, 1868, until on or about Aug. 16, 1869, when he unlawfully attempted to appoint Henry N. Farwell and Mark Healy, since deceased, trustees under the said mortgage, in place of said Gregory and Davis, whose places as such trustees he unlawfully and illegally assumed to be vacant, and said Farwell and Healy accepted said appointment but declined to serve, and never did so serve up to the time of their pretended resignation. That said Farwell and Healy were directors of said Boston, Hartford and Erie Railway.

That on August 14, 1869, there was, and has remained due on said bonds and notes, underlying said Berdell mortgage and not purchased or had by said railroad or said trustee, more than $2,500,000, which was well known to said company and trustees, and the several persons who have claimed to be trustees under said Berdell mortgage.

That on August 14, 1869, there were in the possession of said Eldridge, then president of said Boston, Hartford and Erie Railroad, and claiming to be sole trustee, 2,500 of said Berdell bonds wholly executed by said trustees, Berdell, Davis and Gregory.

That in addition to the 2,500 bonds, said Eldridge had in his possession, or under his control, 4,819 of said Berdell bonds, pretending that they had been pledged

for a loan at 50 per cent. of their par value, and that they were on November 11, 1869, and also in November, 1870, held under said pledge, together with 68,549 shares of the capital stock of said company, all of which it is pretended was pledged by one W. C. Eayrs as trustee for 4,059,396. Said Eayrs during the periods aforesaid was a clerk of said Eldridge without means or responsibility, and in all said transactions was representing said Eldridge, and said bonds professedly held by said Eayrs were in fact held and controlled by said Eldridge, who had fraudulently and illegally taken said bonds and without consideration appropriated them to his own use while he was president of said Boston, Hartford and Erie Railroad Company, and claimed to act as the sole trustee under said Berdell mortgage.

That on or about March 16, 1870, said Healy and said Farwell respectively, induced thereto by the solicitations of said Eldridge, for the purpose of covering up and concealing the fraudulent acts and doings of said Eldridge, by an instrument in writing of that date, signed by them, and delivered to said Eldridge, unlawfully attempted and pretended to resign the position of trustees under said mortgage.

That on said March, 1870, said Eldridge, still assuming to act as sole trustee under said mortgage, attempted and assumed to appoint Thomas Talbot and Moses Kimball trustees under said mortgage to fill two vacancies unlawfully alleged by him to exist.

That on the same date said Eldridge, by an instrument in writing by him signed and delivered to said pretended

trustees, Talbot and Kimball, attempted and pretended to resign his pretended trusteeship under said mortgage.

That no notice, public or otherwise, was given of any of said changes of trustees to said bondholders and stockholders of said road, and no account was ever rendered to the bondholders or stockholders, or either of them, or to any court whatever.

That said Eldridge issued said bonds in vast amount, and sold and disposed of them for all purposes, as well for his own use and benefit as for their lawful purposes under said trust, being thereto empowered by the act of said Berdell, Gregory and Davis, in signing and delivering all of said bonds to the officers of said road. That none of the pretended trustees afterwards appointed, or attempted to be appointed, ever received any of said bonds or ever had control or possession, or interfered with the control of said bonds or other trust property, or the dealings of said Eldridge therewith. That said Eldridge sold and disposed of said bonds at his pleasure without the knowledge or assent of any bondholders who had previously purchased the same.

That on July 25, 1870, said Talbot and Kimball, assuming to be trustees, pretended and assumed to appoint the respondent Avery Plummer to be a trustee under said mortgage.

That Berdell, Davis and Gregory, by their illegal and fraudulent confederations and acts put the property, as well the trust bonds as the others, into the sole possession of Eldridge for the considerations before named, and for other considerations, by which means a large portion of the bonds, which should have been re-

served in trust for the payment of underlying liens, as well as a large portion of the bonds which ought to have been devoted to the construction and equipment of the road, were wholly lost to the road, its stockholders and creditors, only one bond being found unsold at the time of the pretended insolvency of the road, and that in the safe of the Railroad Company, instead of in the possession of either of said trustees.

(Rec. p. 27.)

That by the pledge and disposal of said bonds, large amounts of money were raised and used by Eldridge as trustee, and the officers of said road, in purchasing in the market at speculative prices for the purpose of stock jobbing and other irregular and unlawful transactions, by which very large amounts of money were lost to said road, and said bonds and all the proceeds thereof were wholly squandered, as will appear by the books of the Boston, Hartford and Erie Railroad, when the same can be inspected and brought before the court.

(Rec. p. 29.)

That in violation of Section 6 of said mortgage, (rec. p. 47) said trustees and pretended trustees failed and neglected their duty in this, also that no one of them ever supervised any expenditure or use of any money derived from the sale of said bonds or gave written assent to any contract, and that all such money derived from said sale or the greater part thereof, and larger amounts of said bonds were used for purposes other than those contemplated in or authorized by said mortgage.

That July 15th, 1870, Frederick A. Lane, then a director and counsel of the Erie Railway, and representing and a holder of a considerable sum of Burdell bonds in his own right, and with intent and purpose to get control of said Boston, Hartford and Erie Railroad as an adjunct to and feeder of the said Erie Railway by embarrassing said Boston, Hartford and Erie Railroad by a suit for the foreclosure of said Berdell mortgage, and with purpose of having said road put into the hands of receivers, whom said Lane hoped might be appointed favorable to himself and his designs, caused one George Ellis, his confidential clerk, to bring a suit in equity in the Supreme Judicial Court of Massachusetts for the County of Suffolk, against said Boston, Hartford and Erie Railroad and other parties in said bill named, charging that said road had become default in the payment of the interest on said bonds and asking for the appointment of a receiver, as appears in the bill and copy of proceedings annexed to the report, pp. 113–230, inclusive,

That August 2, 1870, respondents Olyphant, Bartholomew and Gardner were appointed receivers in said suit, who took possession of said road and obtained leave of court to make certain liens thereon and to raise money for carrying on said road and completing and equipping the same, and otherwise to carry on and conduct said road as such receivers, but said receivers were interested with said Lane. That while said Ellis suit was pending, said Lane procured the proxies of a large number of stockholders of said road, and with other stockholders acting with him, at a meeting of the stockholders of said Boston, Hartford and Erie Railroad Corporation, caused said

Eldridge to be removed as president of said road and said Lane was elected as president in his stead, with a board of directors friendly to his designs.

That said Lane, then representing the said road and having control of said Ellis, the plaintiff became *dominus litis*, as well plaintiff as defendant, in said suit, and became desirous that said receivers should be discharged; whereupon he agreed with one Charles P. Clark, then acting as clerk of the receivers, and said Hart and Olyphant and others, who were desirous of getting possession of said road. Certain other persons were joined with said Ellis in said suit as plaintiffs, but whether they were bona fide holders of bonds complainant is ignorant, but notwithstanding that fact, said action was conducted by said Ellis acting for said Lane, in accordance with his views and purposes, and the other parties who joined in said suit as parties' plaintiff permitted themselves to be controlled and directed in the management thereof by said Ellis acting in manner aforesaid. Said Ellis was not a bona fide holder of any bonds of said road secured by said mortgage as alleged in his bill of complaint, that he was a clerk in the office of said Lane, the then president of said road and employed by said Lane to prosecute and direct said suit collusively in the interest of said Lane and his confederates, and in all things in the conduct of said suit in Massachusetts, was directed by and subject to the views, plans and purposes of said Lane, who, with his confederates, were the real parties in interest in said proceeding, the name of Ellis being used as a cover and as that of a nominal plaintiff. In all the proceedings in said suit and in procuring all interlocutory

decrees and orders made in said suit, said Lane was *dominus litis*, as well plaintiff as defendant, thereby deceiving said court, in fraud of the right or other parties in interest, creditors and stockholders, and caused and procured decisions of said court upon moot questions only. It was no part of the relief demanded in said Ellis' bill that the Supreme Court of Massachusetts should decide and determine who were trustees of the Berdell mortgage, that the relief specifically prayed for was a foreclosure, and none other, of said Berdell mortgage by a sale of all the property covered thereby and the appointment of receivers to take charge of the same (Rec. p. 125); but notwithstanding the failure to pray for such relief, by collusion and arrangement between said Ellis and the other parties, and said Lane, who was then president of said road and representing said road in said suit; the said cause was pretended to be submitted to said Court on said bill, answers and a certain agreed statement of facts (Rec. p. 165). That said statement of facts was not a true statement, in that it stated certain matters as true which did not in fact exist, and omitted to state facts necessary to the proper determination of the question, which were well known to said Lane and his confederates; and thereupon said court, on April 24, 1871, without argument on the part of any parties to said action, and by consent of all parties, and being imposed on in manner aforesaid, made a decretal order by which said Kimball, Talbot and Plumer were declared to be, and apparently adjudged to be, the lawful trustees under said mortgage, and that said trustees should have the right, power and authority to take possession of all the property of said Boston, Hartford and Erie Railroad, upon paying

certain sums and making certain arrangements with the receivers who had been formerly appointed (Rec. p. 223). That thereafterwards, without notice to the bondholders, said confederates, or some of them, in furtherance of said conspiracy, procured the pretended resignation of said Talbot, Kimball and Plumer, and the pretended appointment by them of said respondents, Hart and Clark and said Olyphant, who has since deceased.

That said suit in equity in Massachusetts has never proceeded to final determination and decree by said court, and is now pending therein so that no final adjudication has been made of the pretended rights of the parties thereto.

(Certificate, Rec. 153, &c.)

That said Ellis, acting for and in behalf of said Lane and his associate conspirators, and in manner and for the purposes aforesaid, and in furtherance of the conspiracy aforesaid and not otherwise, at the time of commencing said suit in Massachusetts began, as sole plaintiff, suits in equity in the courts of Connecticut, Rhode Island and New York respectively, in which the same persons were appointed receivers as had been appointed by the court in Massachusetts, and said actions in said States other than Massachusetts were being conducted for the same purpose and with a similar prayer in the bills of complaint therein, to wit, that said property of said Boston, Hartford and Erie Railroad should be foreclosed and sold.

That in the States of Connecticut and Rhode Island, in pursuance of said collusive and fraudulent arrangement

between said Lane and others, in pursuance whereof said actions were brought and maintained in the name of said Ellis, agreed statements of facts substantially the same as that submitted to the court in Massachusetts, and which were untrue and incomplete as aforesaid, and that the courts in which said actions were pending, imposed upon by said fraudulent arrangement by the parties thereto, made and signed decretal orders appointing and recognizing said Kimball, Talbot and Plumer as trustees of said mortgage, which decretal orders were drawn, prepared and consented to by the counsel representing said several parties, but in truth and fact upon the procurement of said Ellis for the purposes aforesaid.

(Rec. p. 20.)

That in the State of New York the action brought by said Ellis was discontinued by consent of all parties January 16, 1871, and that August 15, 1871, on petition of the receivers without notice to any of the parties to said action they were discharged from their trusts and ordered to turn over all the property to said Hart, Olyphant and Clark, the then pretended trustees, who had petitioned to be made parties to said suit. And no other order or decree was ever entered in said State of New York in the said action referring to said pretended trustees.

(Rec. p. 21.)

That Hart, Olyphant and Clark, having become trustees as aforesaid, about August 15, 1871, entered upon their pretended duties of running the road and operating the property secured by the said mortgage, and taking and

applying the income and tolls of said road as they saw fit, all which acts and doings were in pursuance of the confederation and conspiracy aforesaid, and in violation of the rights of said road, its stockholders and creditors aver that said Clark, Hart, Lane and others, confederates conspiring against the interests of the stockholders and bondholders, and in order to obtain possession of said company, its franchises, goods and estates, so mismanaged the affairs of said railroad while acting or pretending to act as trustees under said Berdell mortgage, as to permit a default in the payment of interest on said bonds, so that possession of the road and property could be taken and appropriated by them to the use of themselves and their confederates.

That notwithstanding the loss, mismanagement and wrong, and the squandering and waste of the proceeds of said bonds, said road with its connections, leases and assets was worth more than the true and just liens upon it, and from its earnings was able to pay the interest on said bonds, had their assets been devoted to the finishing and equipping of said road by said trustees and officers. (Rec. p. 30.)

That said Hart, Olyphant and Clark, September 16, 1871, with design and purpose aforesaid, did file in the offices of secretaries of state of the States of Massachusetts, Rhode Island, New York and Connecticut, a written notice by them as trustees that they had taken possession of the mortgaged property under the provision of said mortgage

for default in the payment of interest on said bonds to the intent and with the purpose of foreclosing said mortgage.
(Ex. B, Rec. p. 52.)

That the recitals in said notice (Exhibit B, Rec. p. 52) that said Hart, Olyphant and Clark have been recognized as such trustees by the decrees of the courts of New York, Connecticut, Massachusetts and Rhode Island is untrue, since no defence was ever made and entered in said action in said State of New York, and no valid claim was ever duly and properly made in that behalf by said courts of Rhode Island, Connecticut and Massachusetts.

That in October, 1870, one Adams, claiming to be a creditor, petitioned the District Court of the United States for the District of Massachusetts, that said railroad might be declared bankrupt under the provisions of the bankrupt law of the United States.
(Rec. p. 74.)

That said Adams was not a creditor in fact of said road, but was furnished with certain overdue coupons upon the bonds of said mortgage by and through the agency of Lane, then the president of said road, for the purpose of having Adams represent himself as a creditor, and enable him to make said petition, the whole matter being part of the fraudulent scheme conspiracy, and the device to get possession of the railroad against the stockholders and creditors of said road, and convert the same to the use of said Lane and his confederates.

That said coupons were not a provable debt against the estate of said road in bankruptcy, and were not such com-

mercial paper as would lay the foundation for such a petition in bankruptcy.

That the directors of said corporation, upon notice of said petition, duly directed and instructed said Lane, its president, to oppose said proceedings in bankruptcy. That said Lane afterwards reported to said directors that he had procured counsel for the purpose of carrying out the instructions of said directors to oppose said proceedings.

But to the contrary thereof, said Lane, in furtherance of the conspiracy, combination and devices before mentioned, and as a part thereof, employed other counsel than those reported to the directors, and directed such counsel to appear and consent that a decree of bankruptcy should be entered against said company, which consent is the only foundation of said decree against said company, and was wholly unauthorized and not agreed to by any person other than said Lane, who held no authority so to do. That the proceeding was in truth, and fact, a voluntary proceeding, by reason of such consent, and was wholly without law and authority.

(Rec. p. 75.)

That said road and substantially all the property thereof being then in the possession of receivers, under said Ellis' suit, appointed as aforesaid, was not taken possession of by said assignees, or in any way interfered with by them, save that thereafterwards by deed for a nominal consideration, the nature and contents of which complainant is ignorant, they released all the right of the Boston,

Hartford and Erie Railroad in said property, or some portion thereof, to said Clark, Hart and Olyphant, said pretended trustees. Said assignees never administered, or had control or possession of any of the property, franchises and right of said road, except a nominal amount of property not claimed by said receivers, or said supposed trustees.

(Rec. p. 28.)

That said assignees did not demand or claim that said Berdell bonds, or any part thereof, which were or ought to have been remaining in the hands of said trustees in trust, for the purpose of taking up and cancelling said underlying liens, should be held and devoted to said purpose, or should be accounted for to them for such purpose, or that said trustees, or either of them, should account for their breach of trust and for the disposal of said bonds and trust property in violation of the conditions of said mortgage.

(Rec. p. 29.)

That said Hart, Clark and Olyphant, confederating and colluding for their own interests to obtain full possession of said road, caused a notice to be published in certain newspapers directed to the holders of the Berdell bonds, calling a meeting of said bondholders at Boston in April 17, 1873, for the purpose of organizing themselves into a corporation under the terms of said mortgage, which notice was dated March 18, 1873, and was not advertised for a sufficient time to allow all the bondholders, especially those in London, to be present and vote on the matter affecting their interests (Notice Rec. p. 33). That at said

meeting were represented some of the bonds held by the State of Massachusetts, some which had been illegally issued by said Eldridge for his own purposes, some of the bonds which had been sold to the Erie Railway, a large amount of the bonds had been bought up by the trustees at a small price for their individual and private use, and a large amount of bonds that which had come into the hands of said trustees by redemption when the same had been illegally pledged by said railroad, in all amounting to 5,812 bonds, and no more, being a little over one-fourth of all outstanding bonds issued and secured by said mortgage, a majority of which were bonds held by the State of Massachusetts, the history of which is as follows: —

The directors of said Boston, Hartford and Erie Railroad, for the purpose of selling said bonds for their own purposes and uses, and not for the use of the road, applied to the State of Massachusetts for a loan of its scrip to the amount of $4,000,000, which scrip was loaned on the pledge and deposit with the Treasurer and Receiver-General of $4,000,000 Berdell bonds as collateral security for the payment of said scrip at maturity, to wit, in the year 1900.

That said State investigated the affairs of said company prior to said loan, so far as to ascertain and know the terms and conditions of said mortgage requiring a portion of the bonds to be held and reserved for the purpose of paying the underlying liens on said road, and having learned of said underlying liens, made it a condition precedent to the delivery of their scrip that the underlying liens on such parts of

the road as were within the State of Massachusetts should be reduced to at least $1,000,000, but made no provision whatever for the payment or cancellation of underlying liens outside said State.

That said State had due notice that so large an amount of bonds had been already issued by said Boston, Hartford and Erie Directors, when it made the several loans of its scrip that enough did not then remain in the hands of said trustees to provide for said underlying liens, and by so taking said bonds with such knowledge the trust funds of said road devoted to another purpose were taken as collateral security for a loan of its credit. The proceeds of said loan were by the very terms thereof to be devoted to underlying liens and mortgages, and such taking by said State was a diversion of the trust funds made knowingly and willingly, which rendered such deposit of all said bonds as collateral security null and void, and the same ought to be given up to be cancelled or ought to be held by said State for the benefit of said creditors and stockholders of said road; that thereafterwards (in 1871), in violation of the rights of the stockholders and creditors and bondholders of said road, said State attempted, by an act of its legislature, to alter the terms of the contract, by which the bonds were to become their sole property, and were no longer to be held by them as collateral security; and that said State by its own act having become sole owner thereof appeared as the owner of said bonds at the said meeting, and acted as the owner thereof, constituting more than three-fifths of the minority of said bondholders who acted in

said meeting, thereby putting said Clark, Hart, and Olyphant in possession of said road, all of which was illegal and void, and all acts and resolves of said legislature which altered, changed or modified the contract under which the State held the bonds are null and void.

(Rec. pp. 31, 32.)

That at said meeting held on said 17th day of April, 1873, said bondholders, who were present, organized a corporation, to be called the New York and New England Railroad, the majority of individuals present elected themselves directors, upon which board was said Hart and his confederates, and said Hart was afterwards elected president, and said Clark general manager of said road. Said corporation so created took possession of said road, its property, liens, etc., and claim to own and operate them, and continue to operate the same and withhold the same from the creditors and stockholders of said Boston, Hartford and Erie Railroad.

That the bondholders never elected that said bonds should become due and payable before maturity thereof, that said bonds are not yet due, and all action or pretended action in forclosing said mortgage for default in the payment of the principal of said bonds is void.

That at said meeting, April 17, 1873, a vote was passed authorizing the directors to audit the accounts of said trustees and take from them a conveyance of all the property and franchises of said road, and also settle all accounts between said bondholders and trustees, and to pay all balances that might be found due. That said Hart and Oly-

phant, as directors, and Clark, as manager, settled their own accounts with themselves, and conveyed the property to themselves as directors and manager, and were at the same time large stockholders in said New York and New England; that complainant is ignorant how said accounts were settled, or in what manner or upon what terms and conditions said property was pretended to be conveyed to said New York and New England Railroad, and prays for a full discovery of the same from the defendants.

In addition to the prayer that the mortgage be declared null and void, the prayers are, —

1. That the New York and New England Railroad shall hold all of said property, which came to its possession through, by or under the agency of Hart, Olyphant and Clark, upon which the Boston, Hartford and Erie Railroad, or the trustees under the Berdell mortgage, ever had or now have any claim, to be disposed of according to the order of this court.

2. For a receiver.

3. That the several trustees shall each respectively account in due form to the court for each and every transaction suffered or permitted by them while they claimed to act as such trustees, and make good to the complainant, the creditors, and other stockholders what they have lost by reason of each and all the acts, doings, omissions of each and all of said trustees.

4. That if the court shall not decree the mortgage invalid, then that it will establish and confirm the trusts, and remove all persons claiming to act or to be acting for or in place of said trustees, and appoint other fit persons to take hold and administer all said trusts in said mortgage.

5. That all property in control of the defendants shall be delivered to such trustees appointed by the court by proper title, to be held for the benefit of the creditors and stockholders of the Boston, Hartford and Erie Railroad as if the same had never been diverted.

6. That the New York and New England Railroad shall account for all earnings, etc., to such trustees.

ARGUMENT.

In addition to the consideration urged in the appellants' brief under the second assignment of errors:

"In that it held the pretended meeting of the shareholders of the Boston, Hartford and Erie Railroad Company on March 14, 1866, in the City of New York, lawful and regular, and the proceedings at that meeting valid and binding upon the Company."

We beg to submit, —

1. That the meeting was unlawful and irregular, because of the purpose for which it was held, to wit, "in order that the stockholders who should be present acting in the interest of the Erie Railroad" might raise a large sum of money by authorizing a mortgage of the property of the Boston, Hartford and Erie Company, "*a portion of which should be diverted to the use of the Erie Railway.*"

(Rec. p. 10.)

The purpose of the meeting would render it unlawful and irregular had it been held anywhere.

2. Because such proceedings were expressly forbidden by the charter of the corporation.

The power of the corporation to mortgage is expressly provided for in its charter. The entire section (8) is as follows: —

PRIVATE LAWS OF CONN., vol. 5, p. 546, § 8.

"Said Boston, Hartford and Erie Railroad Company may, by a vote of the stockholders at a meeting lawfully called for that purpose, secure any bonds that may issue under the provisions of the statute laws of this State passed May session, 1849, entitled, etc., by a mortgage of their railway and all their property, rights and franchise, or of any part thereof obtained or which they may thereafter obtain in this State, and also in the State of Massachusetts and New York and Rhode Island, *if empowered so to do by the laws of any State into or in which the railroad property or rights mortgaged may be situate*, by deed duly executed by their president, under the corporate seal, to the treasurer of this State and his successors in office, in trust for the holders of said bonds, and recorded in the office of the secretary of this State, and in such other mode and manner as may be required by the laws of the State in which any of said railway property may be situate, . . . provided always that no bond shall be issued for a less sum than $500, and also that there shall not be outstanding at any one time mortgaged bonds of said Boston, Hartford and Erie Railroad Company, or mortgaged bonds of any other company whose road they

may purchase, to a greater amount than that limited by the provisions of the charter of the Hartford, Providence and Fishkill Railroad Company, to wit, one-half the sum which the president and chief engineer certify to the comptroller of this State, under oath, so far as expenditures shall be made by said Boston, Hartford and Erie Railroad Company, and upon their best information, knowledge and belief as to expenditures made by the corporations whose railroad and property said Boston, Hartford and Erie Railroad Company may purchase to have been actually expended upon that portion of the road and property included in said mortgage. And it shall be the duty of the comptroller to see that the bonds resting and secured on said railroad property, rights, and franchises, or any portion thereof, with those registered in his office and uncancelled, shall never exceed the amount limited in this proviso."

The Connecticut statute expressly prescribes the mode in which the corporation is to secure its bonds by a mortgage of its road.

a. The stockholders must be empowered to make the mortgage so far as it can effect property outside the State of Connecticut, by the *laws* of any State in which the mortgaged property may be situate, *before its stockholders can, by vote, secure its bonds, by a mortgage of* such property.

b. The trustee in any and all mortgages made by the corporation is to be "the treasurer of the State of Connecticut and his successors in office."

The mortgage, as made, was void, because the mode prescribed in its charter was not observed.

The vote of the stockholders authorizing the directors to apply for authority to make the mortgage, was in effect a preliminary act. The vote to *make the mortgage*, since it contemplated mortgaging property outside the State of Connecticut, could not be legally taken by the stockholders until after the directors had applied for and obtained the necessary power for the corporation to make the mortgage.

The act of the directors cannot bind the stockholders unless they accept or assent to it in some form.

Railway Co. *vs.* Allerton, 18 Wall. 233.

Nor could the legislatures of the several States authorize the conveyance, by the directors, of vested rights of the stockholders without their consent.

Railway Co. *vs.* Allerton, supra.
Underwood *vs.* Libby, 10 S. & R. 101.
Shank *vs.* Brown, 61 Penna St. 527.
Munhall *vs.* Sullivan, 61 Ill. 218.

The purpose of the mortgage being fraudulent, it could not for that reason be ratified by the subsequent acts of the several legislatures, if no other objection existed.

White Mountain R. R. *vs.* White Mountain Co. 50 N. H. 50.

II.

In addition to the authorities cited on page 57 of the appellant's brief, to the point that the authority to contract must exist on the part of the corporation before any protection, as an innocent purchaser can be claimed by the holders of these bonds, we would refer to

Wells *vs.* Supervisors, 102 U. S. 625.
Marsh *vs.* Fulton Co. 10 Wall 676.
Pierce *vs.* U. S. 7 Wall 686.
Lewis *vs.* Shrieveport, 108 U. S. 282.
Oakland *vs.* Skinner, 94 U. S.

The bondholders are charged with notice:

1. That the directors had no authority to mortgage the road to any person as trustee, except the treasurer of the State of Connecticut.

2. That the stockholders could not lawfully vote to mortgage the road without their having been empowered thereto, by the several States "into or in which the corporate property is situated" prior to such vote.

Thomas *vs.* R. R. 101 U.S., cited in the original brief.

III.

Under the fourth assignment of errors.

"In that it held the proceedings and decree in the Ellis suit in the Supreme Judicial Court of

Massachusetts valid, and regular, and binding upon these appellants, and the decree of foreclosure a bar to this suit."

1. We submit that although the record in a state court shows jurisdiction, it is allowable to plead the facts to show that jurisdiction was not acquired, in which case the plaintiff is not bound by the judgment of the state court.

Thompson *vs.* Whitman, 18 Wall. 457.

Knowles *vs.* Gas Light Co. 19 Wall. 58.

U. S. *vs.* Throckmorton, 98 U. S. 61, cited by the learned judge below, is authority for the doctrine that extrinsic or collateral frauds will authorize the court to set aside the decree.

2. It appears from the opinion of the learned judge of the Supreme Court of Massachusetts, in the report of the case of Ellis *vs.* Boston, Hartford and Erie R. R., 107, Mass., 1-11, that the only matter submitted to the court by the parties upon the agreed statement of facts, was whether the assignments of the Berdell mortgage were valid, and as that was the only question submitted, the opinion is careful to decide only that point.

None of the questions here raised were part of the matter on which the decree was rendered. Everything was assumed to be regular and valid, except the fact that the successors in the trust had been appointed without notice to the stockholders and bondholders.

Our bill requests an account from each of the trus-

tees, and seeks to charge them for their acts and the result of their neglect and omission to perform the duties they undertook by accepting the position of trustees under the Berdell mortgage.

The Massachusetts court has never taken jurisdiction of that matter, nor indeed had it any jurisdiction upon the pleadings in the Ellis suit to determine the validity of the appointment of the successive trustees since it was not asked to do so by the bill.

So far as the trustees are concerned some of them have not even demurred to the bill.

Talbot, Kimball and Plumer appeared in the court below and filed no demurrer.

(Rec. p. 57.)

3. But assuming that the state courts had full jurisdiction over the parties and subject matter of the Ellis suit, there has been no foreclosure of the Berdell mortgage.

1. Because no bill was ever properly brought for the purpose of foreclosing the mortgage by the mortgagee or any bondholder.

2. Because the amount due the bonddholers for the non-payment of which the mortgaged property was to be applied to the payment of the debt secured by the mortgage, has never been ascertained by the court. Such finding is the foundation of the right of the mortgage to proceed further.

3. By the terms of the mortgage the entire debt does not become due absolutely on the default in the payment of interest, except at the election of a majority of the bondholders as declared and notified by them in writing to the mortgagor and to the trustees. The right to foreclose for the whole debt can only be established by such election and notice.

The bill, brought by Ellis, alleges that "he is the owner of thirty bonds and of the unpaid interest warrants thereon payable on the first day of January now last past, and of the first day of July current respectively, no part of which has been paid, and that Matthew Bolles & Company are owners of seventeen of said bonds, no part of which has ever been paid."

(Rec. p. 115.)

Here are 47 bonds, (upon 30 of which the interest was unpaid), out of 19,999 bonds which had been issued.

(Rec. p. 117.)

The Ellis bill alleges (Rec. p. 118) a default in a large amount of the interest warrants due Jan. 1st, 1870, and July 1st, 1870, (but fails to state the amount definitely); that the security is inadequate; that the trustees were allowed to resign without authority; that the bonds had been improperly used, that the trustees were incompetent, that certain suits were pending against the railroad; that the railroad had acquired certain property since the date of the mortgage, which under the terms of the Berdell

mortgage should be included under it; that the legislature of Connecticut had passed a resolution at its May session, 1870, authorizing said railroad to issue its mortgage bonds for $15,000,000, which the stockholders of the corporation intended authorizing at a meeting called to be held in Boston, July 21, 1870, with a view of unlawfully embarrassing the rights of the bondholders under the Berdell mortgage; that the officers have grossly mismanaged the affairs of the orporation, and have converted and misappropriated its property so that it is likely to be lost; that by reason of the loss of public confidenee in the officers, the Berdell bonds have declined and depreciated in the market, so that the same cannot be sold for more than twenty-seven per cent. on the face thereof, and the prayer is that the after-acquired property be decided to be included in the Berdell mortgage; that an account be taken and stated of the amount due the several holders of said bonds and interest warrants, as well principal as interest; also, an account of all property covered or intended to be covered or embraced by said mortgage, and that said mortgage may be foreclosed, and said railroad rolling stock, etc., *may be sold under a decree* of the court, subject to any prior incumbrances thereon or otherwise,as the court may direct.

(Rec. p. 125.)

The decree made under this bill (Rec. p. 223) directs that the receivers shall turn over to the trustees the property, on certain payments being made, and directs the trustees to to file a notice that they have taken possession of said mortgaged property," for default *iu the payment of*

interest on said bonds, and with their purpose to foreclose said first mentioned mortgage for said default."

"And if default in the performance of the condition of that mortgage shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises, etc., shall vest absolutely and in fee in the trustees, etc., without *further assurance and without further process of law*, and all the right or equity of redemption shall be forever barred and foreclosed, *but if the whole of the principal and interest of said bonds in arrear, with interest thereon, when the same may by law be demanded*, and all the lawful claims, disbursements and liabilities of said trustees and their successors, and all the certificates of indebtedness aforesaid, etc., shall be paid and satisfied within said period of eighteen months after said notice shall have been filed, either by the Boston, Hartford and Erie Railroad, or out of the earnings of said road; said trustees shall render to said Boston, Hartford and Erie Railroad possession of said mortgaged property, etc."

(Rec. p. 224.)

The bill was filed to foreclose for the whole debt.

The decree is, that the mortgage is to be foreclosed according to the provisions of the mortgage.

(Rec. p. 48.)

The condition in the mortgage that the debt should become due upon the written notice of the election of a majority in value of the holders of said bonds, given to the mortgagor and the trustees, made it necessary to estab-

lish that such written request was filed with the trustees, at or before the filing of the bill, which was not done.

The decree is that the trustees shall take possession for the non-payment of interest. That in order to redeem the mortgagor must not only pay all interest, but the principal and certain other sums. The decree does not fix the amount due.

The right to foreclose for the whole debt must be established before the decree can properly be granted.

R. R. *vs.* Fosdick, 16 Otto 47.

There is a substantial error in the decree, as to the amount due, for non-payment of which the mortgaged property is ordered to be foreclosed.

Clark *vs.* Reyburn, 8 Wall. 318.

R. R. *vs.* Fosdick, Supra.

Under the terms of the mortgage, the railroad should have been allowed by the decree to redeem, and prevent the title vesting in the trustee, on payment of the interest which had been demanded, under the terms of the bond, not the principal of the mortgage debt, which was not due. This right was denied by the decree.

Olcott *vs.* Bynum, 17 Wall. 62.

R. R. *vs.* Fosdick.

The amount due under the mortgage was $2,100 to Ellis, who does not allege a demand. Matthew Bolles & Co. do not allege that any interest warrants on their bonds have matured.

There is no recital in the bill that the interest warrants were duly presented after maturity, and offer to surrender the same.

The bond is inserted in the mortgage, the trustees know the conditions under which the principal of the bonds were to become due.

A majority of the holders and owners of the bonds have never in any way signified their election that the principal of the bonds should become due and payable before maturity.

(Rec. p. 36.)

The bonds do not mature until 1900.

The trustees cannot rely on the power in the mortgage. Since the bond is the obligation of the corporation and the mortgage a mere security for the performance of the contract. The trustees were (or should have been) mere stakeholders, bound to see that the terms of the contract were complied with, protecting equally the rights of both parties.

Sturgis *vs.* Knapp, 31 Vt. 1. 53.
Ashuelot R. R. *vs.* Elliot, 57 N. H. 397.

In determining the nature of the contract the terms of the bond always govern, if there is an inconsistency between the bond and the mortgage.

R. R. *vs.* Sprague, 103 U. S. 751.

The intent of the whole mortgage is that the trustees

shall not proceed to foreclose the same for the amount of the principal debt until there has been

1. Neglect for six months after due presentation, and offer to surrender the same, to pay any coupons.

2. An election of the holders and owners of a majority of the bonds (over 10,000) that the principal of the bonds shall become due and payable.

3. Such election signified in writing to the corporation and the trustees.

Until then the provisions of the mortgage (sections 7, 8, 9, 10) in relation to the foreclosure by the trustees could not become operative.

See § 3 bond (Rec. p. 42.)

None of these conditions were complied with.

The number of bonds represented at the meeting called by the trustees to organize the corporation, was only 5,812, less than one third of the whole number outstanding.

(Rec. p. 35.)

IV.

But we further claim that the title to the property never passed to the New York and New England Railway.

The meeting at which the new organization was attempted, was fraudulent and void.

1. Because the notice was insufficient.

2. Because there was not a sufficient number of bondholders present to constitute a quorum.

3. Because the only right or foundation for the formation of such corporation was derived from the provisions of the 10th section of the mortgage.

(Rec. p. 49.)

4. Because the bondholders present were not bona fide holders for value.

1. The notice was insufficient.

The object of the notice being to call a meeting of the bondholders, the intent of the meeting being to organize a cotporation, in which the capital stock should equal the amount of bonds outstanding, each bondholder had a right to such a notice of the time, place and object of the meeting, as would give him an opportunity to be present. The call for the meeting being issued on the 18th of March, 1873, and the meeting being held on the 17th of April, 1873, while sufficient to allow some of the bondholders to attend, would have been insufficient to allow bondholders in London and other parts of England to be present.

The trustees, in executing this power, were bound to treat all the bondholders fairly, and give each full notice and

opportunity to be present if he so desired. They had abundant discretion to do so had they been so disposed.

2. The number of bondholders present was insufficient to constitute a quorum. (This occurred by reason of the insufficient notice.)

The provision of the mortgage contemplates the meeting of all the bondholders. All were equally interested, and had an equal right to be present and vote.

This is not a case where the parties remained away, after sufficient notice and opportunity to attend, and are supposed to assent to the action of those present, because they had the opportunity to be present and oppose such action. The case presented is rather where the majority cannot attend, because not notified, being deprived of the right by the action of parties interested in controlling the meeting for their own ends.

There had been no previous election of the bondholders that the principal of the mortgage debt, should be due. No preliminary steps had been taken by the parties to be benefitted by the foreclosure looking towards such action. No bondholder who did not actually see and read the particular paper in which the notice was printed, had any reason to suspect such a meeting would take place.

The object of the meeting being to organize the bondholders into a corporation, and thereby change their relations to the mortgaged property and to each other, it was the imperative duty of the trustees to see that each

bondholder had full notice of the time, place and object of the meeting, so far as it was possible to accomplish it. A bare compliance with the terms of the mortgage in this respect was not enough under the circumstances.

3. Because the only right or foundation for the formation of such corporation, was derived from the provision of the 10th section of the mortgage.

(Rec. p. 49.)

Railroad corporations, can be created only in two ways.

1. By special acts of legislation.

2. Under general laws affecting all corporations, or all corporations of its class.

The right of being and acting as a corporation is a franchise granted by the sovereign power.

This provision of the mortgage was *ultra vires* and *void*.

Thomas *vs.* West Jersey R. R. 11 Otto, 71.
R. R. Co. *vs.* Winans, 17 How. 30.

The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature.

Beaman *vs.* Bufford, 1 Sim. N. S. 550.
Winch *vs.* R. R. Co. 13 L. & Eq., 506.
Black *vs.* Canal Co. 22 N. J. Eq. 130.
Branch *vs.* Jessup, 106 U. S. 468.

The charter of a corporation is the measure of its powers; the enumeration of these powers implies the exclusion of all others.

Thomas *vs.* R. R. supra.

Ins. Co. *vs.* Ely, 5 Conn. 572.

The power to create a new corporation was not incidental or appropriate to the specific power granted by the statute of Connecticut.

Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public.

Turnpike Co. *vs.* People, 96 U. S. 63.

3. This 10th clause in the mortgage was on its face beyond scope of the power of the corporation by which it was made and all parties were charged with notice thereof.

The bonds were issued for the purpose of paying the existing debt of the company, and of completing and equipping the road. The bonds to meet the existing mortgage debt were placed in trust in the hands of the trustees of this mortgage. The trustees were to supervise the expenditure of all sums realized from the sale of the bonds issued under this mortgage, that is the sale of such bonds as were not in their hands in trust.

The three trustees named in the mortgage, certified to all these bonds, and delivered the whole issue into the

hands of Eldridge. This delivery of all of said bonds, so executed by the original trustees to Eldridge, as president, and the subsequent resignation of the three trustees, for a money consideration received by them from Eldridge, in order that he might be appointed trustee, thereby giving him control of the bonds, was a fraud upon the corporation, because Eldridge was thereby enabled, as president of the road, to dispose of the bonds as he pleased.

The bill complains that none of the trustees ever did anything with the bonds after they were passed into Eldridge's hands. That they accepted the position of trustees, and thereby became liable to the duties and responsibilities of such position, but that they did nothing, and had nothing to do, except to hold the place nominally.

Sufficient is alleged to show that the Berdell bonds were invalid in the hands and possession of Eldridge, the question whether the bonds are negotiable instruments is of no importance since they are valid against the corporation only in the hands of bona fide holders for value.

The inquiry as to what became of the bonds after they were so delivered to Eldridge is of importance.

The allegation is upon complainants' information and belief, that $5,000,000 went to the Erie Railroad in exchange for its promissory notes, at a discount; that over $3,000,000 were taken by the Commonwealth of Massachusetts with full knowledge that they were trust bonds held in the hands of the trustees in trust to take up the underlying mortgages.

That $4,819,000 were in the possession of Eldridge in November, 1870, which he appropriated to his own uses without consideration while he was president and sole trustee.

That about $7,000,000 had been issued to take up underlying liens—there is no question but that these latter parties are bona fide holders of the bonds and paid value.

The balance of the issue, save one bond, were squandered in illegal speculation.

4. Because the bondholders present were not bona fide holders for value.

a. The holders present represented "some of the bonds illegally and improperly issued by said Eldridge for his own purposes, some of the bonds which had been sold to the Erie Railroad, a large amount of bonds which had been bought up by the trustees for their own individual and private use, and a large amount of the bonds which had come into their hands by redemption when the same had been illegally pledged," (Rec. p. 35,) in all 5,812 bonds, the majority of which were bonds belonging to the State of Massachusetts, which were a part of the bonds specially devoted to and held for the purpose of taking up the underlying liens on said road. This small minority of bondholders proceeded under the direction of Hart and Clark, the trustees, to organize a corporation, and the majority of individuals present holding said minority of said bonds elected themselves directors,

among them said Hart and Clark; said Hart was afterwards chosen president, and said Clark general manager, and said new corporation took possession of said road and property and franchises, illegally and without warrant of law, and claimed to own and operate the same, and continue to operate the same and control said road and its franchises.

The trustees had full knowledge of the facts set forth in this bill, if from no other source, from the Ellis bill.

(Rec. p. 120.)

John S. Eldridge was president of both the Erie Railway and the Boston, Hartford and Erie Railroad, in Oct. 1867; (rec. p. 30) he continued to be president of the Erie Railway until July 30, 1868, and of the Boston, Hartford and Erie Railroad until December, 1869, (ree. p. 12). While president of the Erie Railway, he was ineligible to be, or hold the office of President of the Boston, Hartford and Erie Railroad, since the Statutes of Connecticut expressly forbid his holding such office.

Gen. Stat. of Conn. Ch. 7, § 445.

"No person who is president or vice-president of any railroad company situated wholly without this State, having a corporate existence and a board of officers distinct from, and unconnected with any railroad situated in and incorporated by the laws of this State, shall be eligible to or hold the office of president or vice-president of any railroad company situated in whole or in part in this State, and incorporated in whole or in part by the laws thereof."

All the bonds were signed by the original trustees and placed in the sole possession of Eldridge. After he got possession of the bonds he issued the same in vast amount. Being forbidden to hold the office of president of the Boston, Hartford and Erie Railroad while he was president of the Erie Railroad, all bonds signed by him as president while also president of the Erie Railway were improperly signed, since he was not, and could not hold the office of, president of the Boston, Hartford and Erie Railroad Company, being expressly forbidden to hold the same by the statutes of the State under which the corporation was organized.

b. As to the bonds held by the State of Massachusetts, as collateral security for the payment of the State scrip due in 1900, the allegations are that the committee of the legislature, and governor and council, knew from investigation that there had been already issued such an amount of said bonds that there did not remain in possession of the trustees sufficient bonds to take up and cancel the underlying liens. (Rec. p. 32.) And knowingly and wilfully took said trust bonds as collateral security for a loan of its credit."

That the same were taken as collateral security for the payment of the scrip of the State at maturity, which did not mature until the year 1900, and that in violation of the terms of the contract, the legislature attempted and claimed to alter and change the terms of the contract by certain acts, which are as follows: —

RESOLVES OF 1871, CHAP. 4.

RESOLVES IN RELATION TO THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Resolved, That authority be, and is hereby given to his excellency the governor, at his discretion, to take such measures as he shall deem proper and expedient to maintain and enforce the rights of the Commonwealth, in and under the bonds of the Boston, Hartford and Erie Railroad Company, secured by a mortgage made by said company to Robert H. Berdell and others, trustees, dated March nineteenth, in the year one thousand eight hundred and sixty-six, and to appoint and employ such agents or attorneys as he may deem necessary for this purpose. And that for the expenses incurred in the execution of this resolve, the governor be, and he is hereby authorized to draw his warrant on the treasury to an amount not exceeding in all, the sum of fifty thousand dollars, and the same is hereby appropriated.

Approved February 7, 1871.

RESOLVES OF 1871, CHAP. 80.

RESOLVE CONCERNING THE BONDS OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, HELD BY THE COMMONWEALTH.

Resolved, That the governor and council be, and they hereby are authorized in their discretion, if any emer-

gency shall, in their opinion, exist therefor, to take any and all necessary measures to obtain for the Commonwealth the absolute ownership of the bonds of the Boston, Hartford and Erie Railroad Company, known as the Berdell mortgage bonds, now held by the Commonwealth as collateral security; and they may sell and transfer the whole or any part of said bonds, on such terms and conditions as they may deem to be for the best interest of the Commonwealth; or they may sell said bonds, or any part thereof, under the provisions of section seven, of chapter two hundred and eighty-four, of the acts of the year eighteen hundred and sixty-seven. In the event of the absolute foreclosure of the Berdell mortgage, so called, or in any proceedings taken for such foreclosure, the governor and counsel, by their duly appointed agents or attorneys, may represent the interests of the Commonwealth at any meeting of the bondholders, and may, in their discretion, surrender said bonds for stock, as provided in said mortgage, or take any other action in the premises which they deem that the interests of the Commonwealth may require.

Approved May 26, 1871.

RESOLVES OF 1871, CHAP. 86.

RESOLVE IN RELATION TO THE UNEXPENDED PROCEEDS OF THE SCRIP ISSUE IN AID OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Resolved, That the governor is hereby authorized to receive for the Commonwealth, from Baring Brothers and

Company, of London, the residue now remaining in their hands, of the proceeds of the scrip or certificates of indebtedness heretofore issued by the treasurer of the Commonwealth for the purpose of aiding the Boston, Hartford and Erie Railroad Company in the construction of its railroad, and to agree on behalf of the Commonwealth to repay the same to the said Baring Brothers and Company, if they shall hereafter be required at law or in equity by final judgment or decree to pay the same to any other claimants of the said funds; and that the governor, with the advice and consent of the council, is hereby authorized to make such compromise and settlement with any claimants of the said funds as he may deem to be advantageous to the Commonwealth, and in pursuance of such compromise and settlement to pay over to such claimants any part of the said funds, upon receiving satisfactory security that the Commonwealth shall be indemnified against loss by reason thereof.

Approved May 26, 1871.

RESOLVES OF 1871, CHAP. 90.

RESOLVE CONCERNING CERTAIN BERDELL BONDS HELD BY THE COMMONWEALTH.

Resolved, That the governor and council be and they are hereby authorized to make such arrangements as they may deem suitable and proper with the holders of the bonds of the Boston, Hartford and Erie Railroad Company secured by the Berdell mortgage, so called, or with any number of said bondholders, as may be necessary to

enable the trustees under said mortgage to obtain immediate possession and control of the property named in said mortgage, and for this purpose any balance of the money appropriated during the present session under the resolve in relation to the Boston, Hartford and Erie Railroad Company and not required for the purposes specified therein, together with such further sum as shall make in the whole a sum not exceeding seventy-two thousand dollars, is hereby appropriated, payable from the treasury; and, the governor is authorized to draw his warrant for such part of said sum as may be necessary, payable to said trustees: *provided*, that before any such payment is made, an additional sum sufficient, in the opinion of the governor and council, to secure the purposes of this resolve, shall have been raised by contributions of other bondholders or otherwise, and shall have been paid to said trustees; and *provided, also*, that before any such payment is made, it shall be the duty of the governor and council to obtain, as far as practicable, security for the repayment with interest of any sums advanced or contributed under this resolve.

Approved May 26, 1871.

And having, in violation of its contract, become sole owner, acted as owner at the meeting at which it was pretended said corporation (the New York and New England Railroad) was formed, and by its agents voted upon them, and said bonds so voted on by said State constituted more than three-fifths of the minority of the bondholders who acted at said meeting in the organization of the pre-

tended corporation, and in choosing Hart and Clark as directors.

(Rec. p. 36.)

We claim that the acts and resolves under which the State claimed to become sole owner of the bonds, are null and void, and in contravention of the constitution of the United States.

The performance of its contract on the part of the State is not excused by a change of circumstances which defeat the intent of the contract.

The Harriman, 9 Wall. 161.

Any deviation from the terms of the contract impairs its obligation.

Green *vs.* Biddle, 8 Wheat. 1.

An enactment impairing such obligation cannot be constitutionally enforced by the State, no matter from what source it originates.

Williams *vs.* Bruffy, 96 U. S. 176.

Stevens *vs.* Griffith, 111 U. S. 48.

Such modification is void if it in any way impair substantial rights.

White *vs.* Hart, 13 Wall. 648.

2. The knowledge that the bonds were issued and deposited in the hands of the trustees for a specific purpose, and that enough bonds did not remain in the hands of the

trustees to carry out the terms of the trust, and that the trust had never been completed, rendered the whole transaction illegal.

3. That Olyphant and Clark, as trustees for the benefit of the stockholders, could not exercise their powers for their own personal end against the interests of the company.

Wardell *vs.* R. R. 103 U. S. 651.

V.

It is admitted that the fraud in the mortgage, or in any proceeding had thereunder, gives the railroad company no right to any benefit that is has received from the issue of these bonds, without paying for such benefit.

It sufficiently appears that there are some creditors of the road who held these bonds for value, notably those who had exchanged the underlying mortgage bonds for the Berdell mortgage.

Any other holder or creditor, who is in law *bona fide* or from whom the road has received a benefit, is entitled on strict rules of equity to recognition and payment.

On the other hand, the stockholders of the Boston, Hartford and Erie Railroad, are entitled to equal protection from the court in their property rights.

There is no contention that the mortgage should not stand for the reasonable value of what the Boston, Hartford and Erie Railroad Company received.

Thomas *vs.* R. R. 109 U. S.

The result of declaring the issue illegal would not effect the holders of underlying liens whose right to a lien on the road is unquestioned.

Neither Eldridge, the Erie Railroad, or the State of Massachusetts were bona fide holders for value.

The bonds being issued fraudulently, sufficient appears to put the holders to proof that they took the same in good faith and without knowledge of the fraud.

The recitals in the bond were sufficient to notify any purchaser for value.

1. That the bond was issued for a particular purpose.

2. That a portion of said bonds were held in trust in the hands of the trustees, and could only be offered in the market for the purpose of retiring the existing mortgage debt.

3. That the corporation did not intend to charge itself with the payment of such bond, except on condition that the proceeds were used as prescribed on the face of the bond, to pay existing liens and to complete its road.

Each holder must be presumed to know the contents of the bond, and the construction which must be given to it

with reference to the time when it was transferred to him.

Commonwealth Bank *vs.* Law, 127 Mass. 72.

The bond shows for what purpose it was to be sold, and each person taking it is presumed to have knowledge of what it imparted.

Fowler *vs.* Brantley, 14 Pet. 318.

Facts and circumstances occurring between other parties, independent and outside of the instrument, may be shown to impeach the holder's title, if circumstances are proved from which notice must be inferred.

Freemans Bank *vs.* Law, 127 Mass. 75.

Each purchaser must be presumed to know the statutes affecting the rights of the corporation.

VI.

We contend that there has been no foreclosure of this mortgage, and that before it can be foreclosed there must be a compliance with the terms of the bond, that the principal shall become due upon the election of a majority in value of the owners and holders, a finding of the amount actually due under the mortgage, and an opportunity offered to the corporation to redeem the same.

R. R. *vs.* Fosdick, supra.

And because there has been no foreclosure, the bill seeks to make all parties who can be affected by the prayers of the

bill, parties to the action. That the court can make the parties immediately liable who are ultimately liable.

Riddle *vs.* Mandeville, 5 Cranch, 322.

It has power to enforce and compel the performance of trusts which have never been performed.

Irwine *vs.* Munhall, 21 How. 558.

The trust estate having been conveyed, the *cestui que trust* may follow the property into the hands of a purchaser for value, if he has notice of the trust. Such purchaser becomes a trustee, and liable in the same manner as the person from whom he purchased.

Powell *vs.* Price, 2 P. Wms. 539.
Bony *vs.* Smith, 1 Verm. 149.
Daniels *vs.* Davison, 16 Ver. 249.

An abuse of trust can deprive the *cestui que trust* of no rights so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of the equities.

Oliver *vs.* Piatt, 3 How. 333.

The court has power to declare the bonds invalid for fraud, and to convert the holder of the property to which the corporation has a better title, into a trustee for the true owner, and compel him to convey the legal title.

Stark *vs.* Starrs, 6 Wall. 419.
Meader *vs.* Norton, 11 Wall. 442.

VII.

As to the assignment in bankruptcy:

1. It has been decided in the Supreme Court of Rhode Island that the title of the New York and New England Railroad Company to the property of the Boston, Hartford and Erie Railroad Company was obtained by virtue of the mortgage foreclosure.

Boston &c. R. R. *vs.* New York &c. R. R. 13 R. I. 131.

The conveyance from the assignees in bankruptcy was merely auxiliary to the title under the mortgage; that conveyance was made to the trustees Hart, Clark and Olyphant *as trustees* under the Berdell mortgage.

The trustees could not purchase trust property, and this purchase enures to the benefit of the principal.

Baker *vs.* Whiting, 3 Sumner, 475.
Schedda *vs.* Sawyer, 4 McLean, 260.
Curts *vs.* Cunio, 7 Biss. 260.

The conveyance to the trustees was a conveyance to the parties entitled to the property before the property passed to the assignees, *i. e.* to the corporation and the bondholders, the trustees being trustees for both.

In this view of the case the discussion of the effect of the adjudication in bankruptcy upon the complainants' rights under the bill becomes unnecessary, if, as contended, the deed from the assignees in bankruptcy to the trustees

under the mortgage revested the title in the corporation subject to the mortgage as before. The deed was in effect, an election on the part of the assignees in bankruptcy to abandon their title to the equity of redemption in the road, as they had a right to do if they regarded the property as onerous.

Clifford J. in Amory *vs.* Lawrence, 3 Clifford, 523, and cases cited.

The assignees are still proper parties to the bill, for the bill prays that the property shall be taken into possession by the court, the assignees represent one class of persons whose rights may be affected by the decree of the court.

Russell *vs.* Clark, 7 Cranch, 69.

But if the court shall determine that any of the parties to the suit are unnecessary, for any reason, their joinder will not prevent a decree against those capable of being sued.

Cameal *vs.* Bank, 10 Wheat. 181.

VIII.

The bill discloses a state of facts by which the stockholders of the Boston, Hartford and Erie Railroad have been deprived of their property,

1. By a mortgage irregularly and improperly issued.

2. By the illegal acts of the officers of the corporation and trustees under the mortgage, which resulted in the

issue of a large amount of bonds, secured by the mortgage, for which the railroad received no benefit.

3. By a pretended decree of foreclosure, which was defective and void, under the authority of which the property of the corporation passed into the possession of a corporation illegally organized by persons not bona fide holders of the bonds.

The court has full authority to inquire into any proceedings by individuals in whatever character they may act or profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is no adequate remedy at law.

The stockholders have a right to insist that their property shall not be taken away from them without due process of law, and that the same protection be accorded their interests in the matter, as is accorded to the creditors.

The prayer of the bill, is that the parties now in possession of the property of the Boston, Hartford and Erie Railroad Corporation "shall hold all said property to be hereafter disposed of according to the order of this honorable court, to be made herein, and not otherwise."

(Rec. p. 38.)

The objections relied upon in the court below to the several allegations in the bill, that they are vague and general, and do not state the case sufficiently

clear for the court to understand what was done, or that the specific fraud is not alleged with sufficient clearness and certainty, are sufficiently met by the fact that the parties against whom the relief is sought, are themselves in possession of these facts and that the defect charged arises from their failure to answer the specific allegations of the bill clearly and distinctly. They have possession of the books and accounts; know just how the transactions took place; were actors in some or all the proceedings alleged not to be clearly stated, and can aid the court materially by a full disclosure of the facts. It is a case of one who has no knowledge against those who both know and have the means of knowing.

The defense is (1) that we do not allege facts which we do not know, and have no means of knowing, except through this proceeding. (2.) That the bill should have been brought earlier. We answer that it was brought as soon as we discovered such facts as we allege. The answers and testimony will furnish a full disclosure.

While we admit that the allegations of the bill would properly be considered vague and indefinite if brought by a corporation which had in its possession the records of the dealings with the trust property, and that a party who had full knowledge is guilty of *laches* if he does not act promptly, we insist that the bill shows upon its face an honest attempt on the part of one who has no knowledge of the facts, but who has lost his property as the result of the transactions complained of, to avail himself of the protection of the court as soon as possible upon his discov-

ery of the irregularities complained of, and before he had full knowledge of the facts.

He relied, and had a right to rely, on the honesty and good faith of the officers of the corporation and the trustees under the mortgage. He has a right to an account from the several persons who have acted or professed to act as trustees, which has never been had, to know the exact facts in regard to the manner in which they have dealt with his property, and what has become of the proceeds. A full answer by the respondents as to their knowledge of the matters alleged, and a hearing on the merits, is the only method by which that right can be secured to him, and he can only secure it in a court of equity.

The court below should be directed to reverse its ruling and the defendants ordered to answer as prayed for in the bill.

BENJ. F. BUTLER,

E. M. JOHNSON, of Counsel.

Supreme Court of the United States.

118-161

OCTOBER TERM, 1885.

Office Supreme Court U. S.
FILED.
APR 3 1886
JAMES H. MCKENNEY.
CLERK.

No. 232.

WILLIAM F. GRAHAM ET AL.,

Appellants,

vs.

THE BOSTON, HARTFORD AND ERIE R. R. CO. ET AL.

BRIEF FOR EXECUTRIXES OF MARK HEALEY,

Appellees.

CHARLES M. REED, *of Counsel.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 24 FRANKLIN STREET.
1886.

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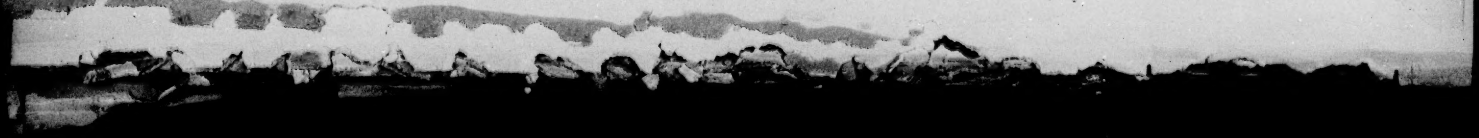

Supreme Court of the United States.

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Appellants,

vs.

THE BOSTON, HARTFORD & ERIE RAILROAD CO. ET AL.

BRIEF FOR EXECUTRIXES OF MARK HEALEY,

Appellees.

These appellees demur to appellants' bill: —

First. For want of equity.

Secondly. For multifariousness.

Thirdly. For laches.

I.

On the face of their bill appellants have stated no legal or equitable ground of action against these appellees.

They attempt to hold them responsible for certain alleged misconduct of their testator, Mark Healey, as one of the trustees under the "Berdell mortgage."

It is alleged that said Healey and one Farwell were appointed trustees Aug. 16, 1869, to fill vacancies caused by the resignation of two of the trustees named in the original mortgage; and it is averred that "said Healey and Farwell accepted said appointment, but declined to serve, and never did serve as such pretended trustees, and did not, in fact, up to the time of their pretended resignation, hereinafter referred to, so serve"; and it is further averred that both of them resigned March 16, 1870. (Record, p. 12.)

It is further averred (p. 26) that all the bonds secured by the Berdell mortgage were prepared for issue and signed by the original trustees before the appointment of defendants' testator; that they were all placed in the possession of the president of the Boston, Hartford & Erie Railroad, Mr. Eldridge, and that "none of the pretended trustees (Healey and others), or either of them, afterwards appointed, or attempted to be appointed, as hereinbefore set forth, ever signed any of said bonds, or ever had control or possession of said bonds, or interfered with the control of said bonds, or other trust property." (Record, p. 27.)

The prayer of the bill, so far as the trustees under the Berdell mortgage is concerned, is, *First*, that they shall be ordered to account for each and every transaction suffered or permitted by them as trustees, and that on such accounting they shall be ordered to pay over all moneys and securities that have come into their possession as such trustees. *Secondly*, that "they shall be adjudged to make good and indemnify your orator, the creditors and other stockholders of said road, which they, or each of them, may have lost by each and every and all the acts, doings, omissions, neglects and misfeasances of each and all," etc. (pp. 38, 39.)

As to the first part of this prayer, no decree can be made against these appellees, for it is expressly averred in the bill that their testator never had possession or control of any of the mortgage bonds or other trust property, and there is no allegation that any property of the corporation ever passed into his hands.

As to the latter part, it is expressly provided in the mortgage, which is made a part of complainants' bill, that "neither trustee shall be answerable for the acts, omissions, or defaults of the other to which he does not give his assent; and that each shall be answerable for gross negligence and wilful defaults only" (p. 51).

These appellees, therefore, are answerable only for the acts and defaults of their testator, and not for those of his co-trustees.

Two charges of neglect are made in the body of the bill:

First. It is averred (p. 16) that under the provisions of the mortgage, it was the duty of the trustees to supervise the expendi-

tures of all moneys derived from sale of the mortgage bonds, and see that the same were used only for purposes specified; and it is charged that no one ever supervised the expenditure of moneys derived from the sale of said bonds, or gave written assent to any contracts, and that a great part of the moneys referred to was used for purposes other than those authorized by said mortgage; this misappropriation being made, as is elsewhere repeatedly charged, not by the trustees, but by the officers of the railroad corporation.

The clause of the mortgage referred to is as follows:

"6." "That the expenditure of all sums of money realized by or from the sale of bonds issued under this mortgage, shall be made with the approval of at least one of said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part, before the same shall be a charge upon any of the sums received from said sales" (p. 47).

1. It is submitted that this clause of the mortgage confers no rights upon the appellants or other stockholders of the railroad as against the trustees.

The mortgage is a contract between the corporation on the one side, and the trustees representing the bondholders on the other.

The clause in question is found among the covenants and agreements of the railroad company, and its obvious purpose was to allow the trustees, on behalf of the bondholders, a supervision over the expenditure of the money advanced by them on the bonds, in order to insure its use in such manner as to enhance the security given for their repayment.

The provision being for the benefit of the mortgagees, and in derogation of the rights of the mortgagor, the mortgagees might rightfully waive it without accountability to any one but their principals, the bondholders.

The bill alleges, in substance, that they did waive this right of supervision, and that they turned over the entire issue of bonds to the railroad company, represented by its officers, to be disposed of at their discretion.

If, in consequence of this action, the property has become an insufficient security for the bonds, the bondholders may have a

remedy against the trustees; but the railroad company or its stockholders have no ground of complaint.

The directors and officers of the company were its chosen agents to carry on its business, and represented it in the execution of this mortgage.

The trustees, on the other hand, throughout the mortgage, are the representatives of the bondholders, creditors of the company.

It is utterly unreasonable to suppose that the company intended to impose on these trustees the duty of protecting it against the acts of its own chosen agents, and equally improbable that the trustees should intentionally accept such a responsibility.

This becomes still more evident when it is remembered that this mortgage was executed by the officers of the road on its behalf, and that the terms of the mortgage to be given as security for the bonds were left entirely in their discretion. (Record, p. 41.)

2. It does not appear that appellees' testator was ever in a position to exercise any control over the expenditure of the proceeds of the bonds. The trust on this point had already been fully exercised by his predecessors.

The bonds remaining undisposed of at the date of his appointment were all in the hands of Eldridge, the president of the corporation, signed by the original trustees, and requiring no further act on the part of their successors to give them validity. (Record, p. 26.)

The officers of the corporation had the power, if not the right, to dispose of them as they saw fit, and were enabled to made contracts without any assent on the part of the trustees.

Moreover, the expenditure of the proceeds of these bonds required the approval of only *one* of the trustees, and as Eldridge was at the same time trustee and president of the corporation, even the formal consent of his co-trustees was unnecessary to effect a compliance with the terms of the mortgage.

The only remedy on the part of the remaining trustees to obtain control of the bonds at this time was through litigation, and this by the express terms of the mortgage deed they were not required to commence unless applied to by a certain number of bondholders, and furnished with funds for that purpose. (p. 51.)

If their obligations, even when the rights of their principals, the bondholders, were concerned, were thus limited, can it be contended that they were bound of their own motion, and at their own expense, to commence litigation for the purpose of protecting the stockholders against their own servants?

At all events, the failure to enter upon such litigation cannot be held to be either "gross negligence or wilful default."

Second. It is also averred that under the provisions of the mortgage (p. 46) it was the duty of the trustees to retain in their hands an amount of bonds equal to the amount of the bonded indebtedness of the road underlying the Berdell mortgage, which bonds were to be given up to the railroad corporation only on the cancellation of a corresponding amount of said underlying indebtedness. It is further averred that on the fourteenth day of August, 1869, the amount of such underlying indebtedness was $2,500,000, and that 2,500 bonds were then in the hands of Eldridge, president of the railroad corporation, set aside for this purpose, and that "afterwards the said officers of said railroad company, with the knowledge and consent of the trustees, and said pretended trustees under said mortgage, did issue and dispose of the whole of the remainder of said 2,500 bonds so executed as aforesaid, but not in exchange for said underlying bonds or notes." (p. 24.)

1. Neither here nor elsewhere in the bill is there any distinct allegation that this misappropriation of the bonds was made with Mr. Healey's knowlege or consent, or even during the term of his trusteeship.

It is charged that the bonds were in Mr. Eldridge's hands August 14th, 1869, two days before the date of Mr. Healey's appointment as trustee.

It does not appear when Mr. Healey accepted the appointment, except that it was prior to March, 1870, when he resigned.

Consistently with the allegations of the bill above quoted, the misappropriation may have been made before his acceptance of the office, or after his resignation.

That the latter was the fact would appear from the subsequent

allegations of the bill (pp. 27, 28), where the specific charge against Messrs. Healey and Farwell is stated to be only that "by holding themselves out as acting as trustees they shielded said Eldridge in his said acts by thus giving it to be understood by said bondholders of said road that said board of trustees was fully and legally constituted, and their interests were being protected by disinterested and competent parties as against said Eldridge and the B. H. & E. R. R., the debtor which Eldridge represented," while Messrs. Avery, Kimball and Talbot, their successors in the trust, are further charged with "not entering into the duties of their trust, which they appeared to hold, and by not taking possession of the trust property and properly caring for the same, and holding the same for the purposes of the trust, and *by permitting said Eldridge to squander and misuse the same*," *etc.*

2. It is submitted that this clause of the mortgage, as well as the one last referred to, imposed no duty on the trustees in favor of the stockholders, and that the trustees are in no way accountable to them for acting, or not acting, under it.

Obviously, the clause was inserted to insure the bondholders against any underlying indebtedness which would take precedence of their mortgage, and thus insure them a first lien on the property of the road.

Under it the trustees were responsible to the bondholders for the manner in which they exercised their trust, but not to the stockholders, whose interests in this regard were entirely different, and for whom they never undertook to act.

3. The delivery of these bonds to the officers of the corporation, for purposes other than taking up these underlying bonds, of itself worked no injury to the corporation, or its shareholders.

The mortgage was given for the purpose of completing and equipping the road, as well as taking up these bonds. (Record, pp. 41, 42.)

There is no allegation in the bill that the 2,500 bonds referred to were not used for the former purpose; and, if so used, no loss could have been occasioned to the corporation, for even if the amount of its indebtedness were thus increased, the value of its

property and consequent capacity to pay its indebtedness would be increased in the like proportion.

4. It appears from the allegations of the bill itself that the bonds in question had been delivered to the officers of the road before the defendants' testator accepted the office of trustee, and were in their possession and control during the whole period of his trusteeship. (p. 26.)

He never had any control over them, and his knowledge or consent to the manner in which said officers used them, was entirely immaterial.

5. If these appellees are accountable to any one beside the bondholders, it is to the assignees in bankruptcy of the B., H. & E. R. R. Co., not to the plaintiff.

The appellants are stockholders, and have no authority as such to represent creditors.

All the property and rights of action which belong to the company have become vested in the assignees for the benefit of creditors, and the stockholders have no interest in or control over them so long as the adjudication in bankruptcy stands unreversed.

That adjudication cannot be collaterally impeached in this proceeding at the suit of stockholders, who are bound by the original decree equally with the corporation.

Sanger *v.* Upton, 91 U. S. 59.
Christmas *v.* Russell, 5 Wall. 304.

II.

The bill is clearly multifarious.

It has at least three distinct objects.

1. To set aside, on various grounds, the foreclosure of the Berdell mortgage, and to recover the mortgaged property from the hands of the New York and New England Railroad Company, its present possessors.

2. To annul the adjudication in bankruptcy and the proceedings

thereunder, and to divest the assignees of their title to the property of the corporation.

3. To hold certain persons — including Mr. Healey, who had been trustees under the Berdell mortgage, but who had resigned their trust long before the foreclosure and bankruptcy proceedings — responsible in damages for certain alleged breaches of trust committed while they were in office.

It is nowhere charged that these alleged breaches of trust had any connection with the proceedings resulting in the foreclosure and bankruptcy.

On the contrary, the allegations of the bill are express that both these things were the result of fraudulent conspiracy on the part of the officers of the road and others, entered into long after Mr. Healey's connection with the trust had ceased. With this fraudulent conspiracy, and the proceedings resulting from it, it is not alleged that he had anything whatever to do.

The first two objects above mentioned appear to be the ones to which this bill is principally directed.

Each of them involves a great number of subsidiary questions, and will, if prosecuted, involve protracted and complex proceedings.

In neither of these objects have these appellees any concern whatever, nor is the claim against these appellees at all involved in their determination.

In each case, the parties interested, the proceedings to be taken, and the decree to be made, would be as distinct as though separate, bills had been filed.

Such separate matters cannot be united in one bill.

Story, Eq. Pl. § 271, and cases cited.
1 Daniel, Ch. Pl. and Pr. (4th Am. ed.) p. 334.
Campbell *v.* Mackay, 1 My. and Cr. 618.
Saxton *v.* Davis, 18 Ves. 80.
West *v.* Randall, 2 Mas. 201.

The bill is further multifarious in praying for accounts from several successive boards of trustees, whose liability under the mortgage is esparate and distinct.

Mr. Healey was a trustee for a period not exceeding seven months, with Messrs. Eldridge and Farwell, and all three resigned at about the same time, viz., March 16, 1870.

With the accounts of the trust before this term commenced, or after it had terminated, or with any breaches of trust committed by his predecessors or successors, he had nothing to do, and these matters should be made the subjects of separate bills.

Benson v. *Hadfield*, 5 Beav. 546.
White v. *White*, 5 Gill, 359.
McLellan v. *Osborne*, 91 Me. 118.

If the appellants have any just claim against Mr. Healey's estate, they have a complete remedy by a separate suit against his executors, in which that claim can be presented and determined by itself.

To compel these executors to join in defending against this voluminous bill, in the principal part of which they haveno concern, would be grossly unjust, involving as it must great and unnecessary expense and long delay and indefinite postponement of the settlemeut of the estate among those entitled to it.

III.

The case stated in the bill shows gross laches on the part of the appellants, as far as concerns these appellees.

The acts of Mr. Healey, for which it is sought to hold them responsible, all took place prior to March 16, 1870.

This bill was not filed until July 8, 1880, a delay of more than ten years.

No excuse is given for this delay, the result of which has been very prejudicial to the estate represented by the appellees, as Mr. Healey himself has deceased during this time, and the benefit of his knowledge of facts and his direct testimony have been lost.

Mr. Eldridge, his co-trustee, and the principal party in the transactions, set forth in the bill as affecting Mr. Healey, has also

deceased, as well as Messrs. Gregory and Olyphant, two other trustees.

Laches apparent upon the face of the bill may be taken advantage of by demurrer.

Maxwell *v.* Kennedy, 8 How. 222.

Appellants' counsel stated in open court, at the hearing in the court below, that no substantive relief would be claimed against these appellees, but he declined to dismiss the bill as against them.

As this is not a bill for discovery, a defendant against whom no relief can be had is not a proper party, and is entitled to have the bill against him dismissed.

Stewart *v.* East India Co., 2 Vern. 380.
Le Texein *v.* Annspach, 15 Ves. 164.
Smith *v.* Snow, 3 Mad. 10.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 232.

WILLIAM F. GRAHAM

v.

THE BOSTON, HARTFORD & ERIE RAILROAD COMPANY ET AL.

BRIEF FOR THE DEFENDANTS, CHARLES S. BRADLEY, CHARLES R. CHAPMAN, AND GEORGE M. BARNARD.

C. S. BRADLEY,
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THE BOSTON, HARTFORD & ERIE RAILROAD COMPANY ET AL.

BRIEF FOR THE DEFENDANTS, CHARLES S. BRADLEY, CHARLES R. CHAPMAN, AND GEORGE M. BARNARD.

This is a bill in equity, filed in July, 1880, by a stockholder of the Boston, Hartford & Erie Railroad Company, owning less than one per cent. of the stock, purporting (Record, p. 3) to act in behalf of all the stockholders and creditors of the Company, to set aside a mortgage of its road, made in March, 1866, for $20,000,000; to avoid a foreclosure of the mortgage made by decree of the Supreme Judicial Court of the State of Massachusetts, on a bill filed in July, 1870, as well as by entry *in pais* according to the terms of the mortgage; to have the court "set aside and hold for naught" proceedings in bankruptcy against the Company begun in October, 1870; and to annul a conveyance of the road made in June, 1875, to the New York & New England Railroad Company by the trustees under the mortgage.

Among the numerous persons against whom this bill is brought are these three defendants, described (Record, p. 2) "as assignees in bankruptcy of the said Boston, Hartford & Erie Railroad Company." Their connection with the case is this:—

After the bill to foreclose the mortgage was filed, involuntary

proceedings in bankruptcy were had against this Company; and the assignees released the equity of redemption to the trustees under the mortgage.

Such was the statement in the original bill.

But, as was pointed out by demurrer, the assignment in bankruptcy prevented the plaintiff from having any standing in court.

The plaintiff was obliged to get this fatal obstacle out of his way; and for this end he filed an amendment to the bill, alleging that the adjudication in bankruptcy was void, as procured by fraud and collusion, and that therefore all proceedings under it must fail.

There is no suggestion that these defendants were parties to, or in any way cognizant of, the fraudulent procurement of the adjudication.

What the manner was in which the adjudication is alleged to have been procured by fraud will be considered, No. III., *infra*. But there are two preliminary considerations, either of which is decisive against the plaintiff.

I.

THE PLAINTIFF HAS NO STANDING IN COURT. ANY PROCEEDING FOR RELIEF MUST BE TAKEN BY THE COMPANY.

Assuming (which we shall show is not the case) that the bill alleges that, by the fraud of a former president of the corporation, a consent that it should be adjudged a bankrupt was improperly given, and thereby its stockholders were injured, yet any proceeding to have relief against the fraud must be brought by the corporation. The appellants are two shareholders, who own between them less than one-third of one per cent. of the stock.

The conditions and circumstances under which a stockholder can bring a suit on behalf of himself and other stockholders were argued on at length in the Circuit Court. But such argument is now unnecessary. The case of *Hawes* v. *Oakland*, 104 U. S. 450, has closed the discussion. It more than covers the present case. It not only decided a particular controversy: it settled a policy which has been more than once since emphatically approved.

See for instance *Detroit* v. *Dean*, 106 U. S. 537, 541, 542.

Dimpfell v. *Ohio & Mississippi R. Co.*, 110 U. S. 209, 210, 211.

Equity Rules, 94.

The allegations which, in *Hawes* v. *Oakland*, were, on demurrer, deemed insufficient, were that the plaintiff requested the directors to desist from their illegal practices, and to take immediate steps against the city, and that the directors wholly declined to take any proceedings whatever, and threatened to continue their practices.

The allegations in the present bill are (p. 3) that the plaintiff "requested of and demanded from" the directors that they should bring a suit, or take such legal proceedings as were necessary to secure the relief prayed for by this bill, and that the directors "neglected and refused, and still neglect and refuse," so to do.

In both cases, the ordinary hack allegations.

Compare this with the conduct which is declared necessary in *Hawes* v. *Oakland*.

"In addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part; and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, why it could not be done, or it was not reasonable to require it. The efforts to induce such action, as complainant desires, on the part of the directors, and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity; and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction, in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit" (104 U. S. 460, 461).

None of these things, declared by *Hawes* v. *Oakland* to be necessary, are to be found in this bill.

(1) It is not apparent that there was an earnest effort with the

directors. The "request and demand" may have been, and doubtless were, simulated.

(2) No effort whatever was made to obtain action from the stockholders; and the plaintiff has not shown why this could not be done, or why it is not reasonable to require it. No reason is shown why any evil would have resulted from the delay necessary for an application to the stockholders. Having waited ten years, the short time necessary to make such application could work no harm.

Had such application been made, the stockholders could (and for all that appears would) have ratified the consent to the adjudication. The consent was not *ultra vires*.

The appellants have no standing, as representing the body of the stockholders, to set aside proceedings which ninety-nine and two-thirds per cent. of the stockholders (for all that appears) do not wish disturbed.

(3) The efforts to induce action on the part of the directors are not stated with particularity; and, so far from any efforts with the shareholders or the cause of failure with the directors and shareholders being stated with particularity, none such are stated at all.

(4) The appellants do not pretend to have been shareholders at the time of the transactions of which they complain, or that their shares have devolved on them since by operation of law.

This renders it unnecessary to dwell on the point that, for all that appears, the shares of the plaintiff may have been got, directly or indirectly, from Lane himself, or been bought for the purpose of fomenting this litigation.

The language in *Dimpfell* v. *Ohio & Mississippi R.R. Co.*, 110 U. S. 209, 210, describes exactly the bill in this respect.

"It does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the company, in the hope that they might thereby extort from its fears a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive."

(5) It is not alleged that this suit is not a collusive one to confer jurisdiction on a United States Court.

(6) So far from the bill being verified by affidavit, it should be observed that, while the original bill alleging that the bankruptcy was in due form of law was sworn to, the plaintiff has not dared to swear to the amendment alleging fraud.

II.

THE PLAINTIFFS ARE BARRED BY LACHES.

As the full record of the bankruptcy proceedings has not been annexed, it is impossible to show how greatly the rights of third persons have intervened, and how the assignees have collected and sold large amounts of property and distributed considerable dividends, all with the approval of the court. They can only rely on the presumptions arising from the ordinary course of the administration of estates under the direction of the court.

The letter of the two years Statute of Limitations given by Rev. Sts., § 5057, to and against assignees, may not apply to this case. *In re Conant*, 5 Blatchf. 54, *Clark* v. *Clark*, 17 How. 315, 321. But it can at least be referred to as showing the spirit and purpose of the Bankrupt Law, which is to be borne in mind in considering what is laches in bankruptcy proceedings.

Sufficient laches is apparent to prevent the maintenance of this suit.

It appears that ten years have elapsed between the filing of the petition in bankruptcy and the filing of this bill (Record, pp. 1, 74), and that the assignees have sold the equity in the railroad to persons from whom it has passed to a new corporation (Record, p. 28).

Laches can be taken advantage of by demurrer.

Lausdale v. *Smith*, 106 U. S. 391.

Laches would be a bar to a suit by the Company.

Badger v. *Badger*, 2 Wall. 87.
Sullivan v. *Portland & Kennebec R.R. Co.*, 94 U. S. 806.
Brown v. *Buena Vista*, 95 U. S. 157.
McLean v. *Fleming*, 96 U. S. 245.
Godden v. *Kimmell*, 99 U. S. 201.

The plaintiff attempts to avoid his laches by the following allegations: —

"And your orator, upon information and belief, and of his own

knowledge, further avers that all notice or knowledge of said proceedings was wholly concealed from him and from said stockholders of said corporation and said board of directors, except that they were told by their said president that there had been a legal adjudication against them in bankruptcy in the proper court of the United States, to which they were bound and obliged to submit, and to which they did submit; and that knowledge of the facts herein set forth in this behalf has come [*qu.* not come] to your orator, or to any other of the stockholders of said Company, as your orator is informed and believes, and therefore avers, until the time that an examination in his behalf of what proceedings had been had was made as a part of the prosecution of this suit" (Record, pp. 75, 76).

There are two answers to these allegations:—

First.— That the plaintiff's own bill makes allegations inconsistent with them; and the defendants have a right to avail of those inconsistent allegations, and to ask the court to consider them as the allegations demurred to.

Vernon v. *Vernon*, 2 Myl. & C. 145.
Knapp v. *Snyder*, 15 W. Va. 434.

The copy of the bankruptcy proceedings, annexed to and made part of the bill, shows that the alleged fraudulent consent to the adjudication in bankruptcy was given March 1, 1871 (Record, p. 97), and that, in the same month, one Sweatt, a stockholder and bondholder of the Company, filed a petition and affidavit in the Circuit Court, alleging that the petition to revise the ruling of the Bankrupt Court on the motion to dismiss was withdrawn by agreement without his knowledge; that an assent to the adjudication was filed by the Company through Judge Abbott; that the Company was adjudged a bankrupt; that he had believed the officers of the Company would prosecute the revising petition to a final decree of the Circuit Court after full hearing and argument; and that he was greatly aggrieved by the adjudication in bankruptcy; and praying that the same might be reversed.

It therefore not only appears that the consent to the adjudication was known, but that a stockholder immediately brought a petition in the Circuit Court to have the adjudication set aside, on the ground that it was against law, and because it ought not to have been consented to. The mutilated condition of the bankruptcy record annexed does not show that the elaborate decision reported

in *Sweatt* v. *B. H. & E. R.R. Co.*, 3 Clif. 339, was made on this petition, nor what became of it. It is not alleged that it was not rightly disposed of; and the presumption in the absence of allegations is that it was. At all events, public recorded knowledge of the consent to the decree is shown; and there is no suggestion as to any collusion in the Sweatt proceeding.

Second.— If the allegations were true, they would not in law show that the plaintiff's conduct is not laches. This is best shown by extracts from opinions of this court.

Badger v. *Badger*, 2 Wallace, 87, 95: "The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill. Otherwise, the chancellor may further refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer."

Hoyt v. *Sprague*, 103 U. S. 613, 637: "In such cases, it is not merely a question as to what information respecting their rights parties do actually obtain; but as to what information they might have obtained, had they used the means and opportunities directly at their command. Others, acting in good faith, also have rights; the world must move, and it is the interest of the community that controversies should have an end."

See also

Marsh v. *Whitmore*, 21 Wall. 178, 185.
Sanger v. *Upton*, 91 U. S. 56, 59.
Godden v. *Kimmell*, 99 U. S. 201, 212.

The acts complained of were all of record in the Bankruptcy Court and in other public records.

Allegations of fraud must always be precise and definite; but, when like the allegations here of concealment of the proceedings in court from all the stockholders of this great railroad running through four States, which was constantly before legislatures and courts, and whose affairs always excited much public interest, they are incredible; when, to use the words of Wigram, V. C., in *Foss* v. *Harbottle*, 2 Hare, 461, 503, they "cannot by possibility be true,"

they must be construed with the greatest strictness. The language of that learned judge is strikingly appropriate to this case.

"I must further observe that, although the bill does, with great caution, attempt to meet every case which it was supposed might have been fatal to it upon demurrer, yet it is by allegations of the most general kind, and many of which cannot by any possibility be true. It alleges the recent discovery of the acts complained of, but it gives no allegation whatsoever for the purpose of telling when or how such discovery was made or what led to it. I am bound to give the plaintiff, on a general demurrer, the benefit of the allegation that the matters complained of have been recently discovered, whatever the term 'recently discovered' may mean; but, when I look into the schedule to the act, I find that many of those matters must have been known at a very early period in the history of the Company. I find, also, provisions of the act requiring that books shall be kept, in which all transactions shall be fully and fairly stated; and I do not find in the bill anything like a precise allegation that the production of those books would not have given the information, or that there have not been means of seeing those books at least some time since 1835, or since the transactions in question took place, so that, in point of fact, many of the transactions might and may have been sooner known. These are observations upon which I do not found my judgment, but which I use as explaining why it is I have felt bound, in favor of the defendants, to construe this bill with strictness."

Any attempt to avoid the effect of laches by bringing in Amelia Teresa Raymond and relying on her infancy is futile.

In the first place, she did not own her shares at the time of the alleged fraud; and therefore, in accordance with *Hawes* v. *Oakland*, she has no standing in court.

In the second place, a disability commencing after the Statute of Limitations has begun to run will not stop the statute. No more ought it to excuse *laches*.

In the third place, the question is not whether Amelia Teresa Raymond has been guilty of laches, but whether the class she represents has been guilty of laches. This is really a bill by all the stockholders. As an indulgence in pleading, one stockholder is allowed to represent the class; but, if those whom the stockholder represents have been guilty of laches, the fact that he himself has not been, will not help the bill. The act complained of is one to

which the majority may assent by laches, or otherwise, and bind the whole. This is a bill in behalf of the corporation; and, if it is barred, its stockholders are.

III.

NO FRAUDULENT INJURY IS ALLEGED.

We now come to the allegations of the bill. This is so complicated that it is desirable to state precisely and separately the allegations which in any way touch these defendants.

The averments in the original bill concerning these defendants or the bankruptcy of the Company were: —

(1) That one Adams, claiming to be a creditor to a small amount, petitioned that the Company might be declared a bankrupt, and that all its property might pass to assignees thereafter to be chosen. That "such further proceedings were had that on the second day of March, 1871, an adjudication of involuntary bankruptcy was made, and a decree in due form of law" by the bankrupt court, and that these defendants "were appointed assignees; and, by a duly executed deed of assignment, all the property, franchises, rights, and privileges of" the Company "were conveyed to said assignees" (Record, p. 28).

(2) That "substantially all the property" of the Company, being in possession of receivers appointed by the State Court, "was not taken possession of by said assignees or in any way interfered with by them," except that by deed, for "substantially a nominal consideration," they released all the rights of the Company "in said property, or some portion thereof," to persons claiming as trustees under the mortgage; that "said assignees never administered, dealt with, or had control or possession of any of the property or franchises or rights of said road, except a small and nominal amount of property not claimed by said receivers or said supposed trustees"; and that "said assignees" did not demand that any of the mortgage bonds should be devoted to taking up underlying liens, or that said trustees should account to said road or to said assignees for their failure so to devote them and for the disposing of them otherwise (Record, pp. 28, 29).

This bill was demurred to on the ground that, as the property of the Company had been transferred to assignees in bankruptcy, neither stockholders nor creditors had any standing in court.

(Record, pp. 58–63.) This objection was so obviously fatal that the plaintiff was driven to amend, which he did in the following manner: —

He struck out the averments marked (1), *ante* (Record, pp. 73, 74). This left the bill without any direct allegation that there was either an adjudication in bankruptcy or an assignment.

He then added the following: That one Adams, claiming to be a creditor to a small amount, petitioned that the Company might be declared bankrupt; that "Adams was not a creditor in fact" of the Company, but "was furnished with certain overdue coupons upon the bonds" of the Company "by and through the agency of Frederick A. Lane, then President" of the Company, "for the purpose of having said Adams represent himself as such creditor, and enable him to make said petition in bankruptcy, the whole matter being part of the fraudulent scheme and conspiracy and the devices" in the bill "set out to get possession of the railroad against the stockholders and creditors of the Company and to convert the property thereat [*qu.* thereof] to the use of said Lane and his confederates" (Record, p. 74).

That "said coupons were not a debt provable at the time of said petition against the estate of said Boston, Hartford & Erie Railroad Company in bankruptcy, and were not such commercial paper as would lay the foundation for such a petition in bankruptcy, in this: —

"*First:* That said pretended debt was a certain number of coupons of said bonds, as before stated, which were furnished through the instrumentality of said Lane to said Adams, to appear as a creditor for the purpose of said petition.

"*Second:* That said coupons were not commercial paper, within the meaning of the law, upon which jurisdiction could be founded to present a petition for involuntary bankruptcy, in this; that they were secured by mortgage, and so not provable against the estate without the surrender of the security to the assignee, or a release of the security, neither of which was ever done; and that said debt could not be proved against the estate at the time of the presentation of said petition, nor afterwards, except upon contingencies that could not happen at the time said petition was filed, and did never happen thereafterwards."

"*Third:* That said bonds were never issued by a banker, broker, merchant, trader, manufacturer, or miner, and could not be the foundation for such petition."

"*Fourth:* That the court never made any adjudication thereon" (Record, pp. 74, 75).

That the directors of the Company ordered Lane to oppose the proceedings in bankruptcy; that Lane reported to the directors that he had employed Judge Curtis, "in whose legal learning, ability, and integrity of character all had confidence," as counsel to oppose the proceedings in bankruptcy; that neither the stockholders nor the directors consented to an adjudication in bankruptcy; but that Lane, "in furtherance of the conspiracy, combination, and devices hereinbefore mentioned, and as part thereof, procured the services of J. G. Abbott, Esq.," to represent the Company, "and consent that a decree of bankruptcy should be declared against said Company, which consent is the only foundation of said decree herein" (Record, p. 75).

"That said proceedings, and the decrees and acts of the court founded thereon, are without jurisdiction, unauthorized and void, and of no effect, and were procured by fraud and collusion in manner aforesaid" (Record, p. 75).

"That all notice or knowledge of said proceedings was wholly concealed from" the plaintiff and the stockholders and directors, except that they were told by Lane that there had been a legal adjudication in bankruptcy to which they were bound to submit; and that knowledge of the facts set forth in the bill has (*qu.* has not) come to the plaintiff or any other of the stockholders, until the prosecution of the present suit (Record, pp. 75, 76).

The plaintiff annexed, "as part of this bill and an exhibit thereto, a copy of said proceedings in bankruptcy."

This copy shows: —

(1) That Adams filed a petition praying that the Company might be adjudged a bankrupt (Record, p. 87).

(2) That Judge Curtis, as counsel for the Company, moved in the Bankrupt Court that the petition should be dismissed (Record, pp. 96, 97).

(3) That Judge Curtis, counsel for the Company, filed a revising petition in the Circuit Court, alleging that his motion in the Bankrupt Court had been argued and overruled, and praying that the action of the Bankrupt Court might be revised (Record, pp. 85, 86).

(4) That the revising petition was withdrawn by consent, Judge Curtis's son, who had signed the revising petition as solicitor, signing the consent (Record, p. 94).

(5) That the Company assented by Judge Abbott to an adjudication of bankruptcy (Record, p. 94).

(6) That one Sweatt, a creditor and stockholder of the Company, filed a petition and affidavit in the Circuit Court alleging the filing of Adams's petition, Judge Curtis's motion to dismiss, a hearing on the motion, a decision by the Bankrupt Court that it had jurisdiction, the filing of the revising petition, the agreement to withdraw the petition, the assent to the adjudication by Judge Abbott, and an adjudication in bankruptcy; and praying the court to reverse the decision of the Bankrupt Court (Record, pp. 95–99).

The allegations in substance seem to be that Lane procured a petition in bankruptcy to be filed against the Company, and then, having retained one counsel, with the approval of the directors, to oppose the adjudication, employed other counsel to assent to it, and informed the directors that the court had made the adjudication and they were bound to submit.

Now, assuming for the sake of the argument, that, if the president of a solvent corporation, which has not committed an act of bankruptcy, procures a petition, founded on a fictitious debt, to be filed to have it adjudicated a bankrupt, and, being authorized to employ certain counsel to oppose the adjudication, does not employ him, and without his approval fraudulently consents, by other counsel, to an adjudication to which there is a good defence and there is an adjudication made, and then he tells the directors that there has been a binding adjudication, he will have committed a fraud; and, if the stockholders have been injured by the fraud, they have a right to have the adjudication set aside; yet that is far from being this case:—

(1) It is not alleged that the Company was solvent.

(2) It is not alleged that the Company had not committed acts of bankruptcy.

(3) It is alleged that the coupons on which the petition for bankruptcy was brought were overdue and unpaid.

(4) Though it is alleged that Adams was not a "creditor in fact," whatever that may mean, it appears that he was a creditor in law; for he was "furnished with certain overdue coupons upon the bonds of the Berdell mortgage," payable to bearer (Record, pp. 74, 93),— that is, he was the holder of negotiable paper of the Company, and as such he had a provable debt, and was therefore entitled to bring a petition to have the Company adjudged a bankrupt.

(U. S. Rev. St., § 5023.) Being the lawful holder of the coupons, it is perfectly immaterial whether he got them by gift, purchase, or otherwise.

Law v. *Parnell*, 7 C. B. (N. S.) 282.
Ancona v. *Marks*, 7 H. & N. 686.
Wheeler v. *Johnson*, 97 Mass. 39.

(5) It is not alleged that Adams's petition was not brought and pressed in good faith by his counsel.

(6) It appears that Lane did employ the counsel whom he was directed to employ, and that said counsel did move to have Adams's petition dismissed; that he filed a petition in the Circuit Court, alleging that the motion had been argued and overruled in the court of bankruptcy, and praying a revision; and that the withdrawal of this petition was by him. These facts are suppressed in the body of the bill, but appear in the copy of the proceedings in bankruptcy annexed to the bill as part thereof. The allegations of the bill are inconsistent with collusion by Judge Curtis; and, indeed, none is charged, nor is any such idea permissible, with regard to him or to any of the counsel concerned.

(7) It does not appear that there was any defence to the adjudication. The bill does not allege that the corporation was solvent, or that it had not committed acts of bankruptcy. The coupons were provable debts, and there was no occasion that they should be commercial paper. Failure to meet commercial paper is an act of bankruptcy; but, when this or any other act of bankruptcy has been committed, any one with a provable debt of any sort may petition for an adjudication of bankruptcy against the debtor (Rev. Sts., § 5023).

A secured debt will support an involuntary petition, unless the security is sufficient to cover the debt, which is not alleged; nor does such appear to be the fact. *Re* Alexander, 1 Lowell, 470. And the allegation that the debt "could not be proved against the estate at the time of the presentation of said petition, nor afterwards, xcept upon contingencies that could not happen at the time said petition was filed, and did never happen thereafterwards" (Record, p. 74), is a mere conclusion of law, which is not admitted on demurrer; and no contingencies or other facts are stated to support the allegation, which the defendants could reply to or the court pass upon.

Alabama v. *Burr*, 115 U. S. 413, 426.

(8) It is not alleged directly that there was any adjudication or assignment (see *ante*, p. brief). There is no such allegation in the bill, and there is no adjudication or assignment in the copy of the bankruptcy proceedings.

(9) It is not alleged that these defendants were any parties or privy to Lane's fraud, or that they were not chosen by a majority of the creditors and approved by the court, as the law requires, and as, in the absence of any allegations to the contrary, must be assumed to be the case.

(10) It does not appear that the adjudication in bankruptcy has in any way injured the stockholders. No actual injury is alleged. Whatever defect there may have been in Adams's petition, if the road was bankrupt and insolvent (and it is not alleged that it was not), any creditor might at any time have put it into bankruptcy; and there was no reason why a defence should be made to Adams's petition. Certainly, the stockholders were not injured by the failure to make one. It does not appear that they would have been any better off, if the adjudication had not been made.

(11) It is alleged that Lane's object in causing the alleged proceedings to be brought in the State and Bankruptcy Courts was that the Boston, Hartford & Erie Railroad might become an adjunct to and feeder of the Erie Railway (Record, p. 17); but this purpose, even if it was fraudulent, was frustrated. It is not alleged that the Boston, Hartford & Erie Railroad ever became an adjunct to or feeder of the Erie Railway; and, in fact, it never did.

(12) A bill which alleges fraud in an adjudication in bankruptcy, and purports to have a copy of the bankruptcy proceedings annexed, should not be allowed, if the alleged copy appears on its face to be materially defective.

These defendants have, unfortunately, no means in this case of bringing up the record, and showing how it has been mutilated by the plaintiff; but, if it appears from the plaintiff's own pleadings that, while purporting to set forth a copy of the bankruptcy proceedings and relying on them to prove fraud, he has not produced a true copy of the record, and has omitted portions essential to an understanding of it, then the bill should be dismissed.

That is the case here. The plaintiff is in this dilemma. Either there has been no adjudication or assignment at all, or the copy of the proceedings is defective in its most vital part.

Nor has he produced portions of the record shown to exist by

what he has produced or alleged. The proceedings on Sweatt's petition are incomplete. So the action of the assignees is indistinctly averred; and it is not alleged that it does not appear on the records of the court, as by law required.

In short, this is a case where (so far as appears to the contrary in the bill) an insolvent corporation, having committed acts of bankruptcy, was adjudicated a bankrupt on a petition brought on a valid and provable debt, and its property transferred to assignees chosen by a majority of creditors and approved by the court. And the only reason alleged why such adjudication could have been resisted then or can be complained of now is that the petitioner was induced to take his lawful action by the wish of the President of the Company to carry out a purpose which is not shown to be fraudulent, of which the assignees knew nothing, and which has utterly failed.

If the appointment of these assignees was valid, no subsequent misbehavior would avoid their appointment; but no misbehavior is alleged. The bill alleges that the property of the Company was substantially all in the hands of receivers appointed by the State court, and did not come to the hands of these assignees, and that these assignees sold the equity of redemption to the trustees of the mortgage for a "nominal consideration"; but it does not charge that a nominal consideration was not a sufficient price, nor any facts showing that it was not a sufficient price, nor that it was without the approval of the court.

It is alleged that the assignees never administered, dealt with, or had control or possession of any of the property or franchises or rights of the Company, except a small and nominal amount; but it is also alleged that the property of the Company was substantially all in the hands of receivers appointed by the Supreme Judicial Court of Massachusetts, and the assignees had no right or power to take the property out of the control of that court, and had no suspicion, or reason to suspect, that the proceedings before that court were not in all respects proper; and no such right or power or suspicion, or reason for suspicion, on their part, is alleged.

Clark v. *Bininger*, 3 B. R. 524.
Alden v. *Boston, Hartford & Erie R.R. Co.*, 5 R. R. 230.
Davis v. *R. R. Co.*, 1 Woods, 661.

And it is not alleged that any one ever requested these assignees to interfere with the administration of the Company's property in

the State court, or that they could have interfered with success, or that any injury resulted from their non-interference.

And, in the absence of allegations to the contrary, it is to be presumed that these assignees conducted themselves properly in the duties of their office, including the duty of filing their accounts in detail as required by law; and they are entitled on demurrer to the benefit of these uncontradicted presumptions.

IV.

If the adjudication had been procured by fraud, a bill like this is not a proper mode to set it aside.

(1) This bill, as amended, is a bill which, treating the bankruptcy proceedings as based on fraud, disregards them as wholly void.

The original bill dealt with the bankruptcy proceedings as good and valid (Record, p. 28), and of course contained no prayer with regard to them. The amended bill declares that the plaintiff has a right to have the court "set aside and hold for naught all said proceedings in bankruptcy," but contains no new prayer.

The bill is, therefore, not a bill directed to the revocation of the adjudication, but a bill impeaching it collaterally.

This cannot be done. Bankruptcy proceedings cannot be impeached collaterally for fraud. This is not only clear on principle, but it is expressly settled by the case of

Michaels v. *Post*, 21 Wall. 398,

where, in an action by an assignee in bankruptcy against a preferred creditor, it was held that the creditor could not show that the adjudication was procured by fraud.

If a decree *in rem*, such as an adjudication in bankruptcy, can ever be impeached collaterally for fraud, it can only be by strangers, never by parties to the proceedings.

Prudham v. *Phillips*, 20 How. St. Trials, 479 n.
Christmas v. *Russell*, 5 Wall. 290, 304.
Maxwell v. *Stewart*, 22 Wall. 77, 81.

And stockholders are parties to an adjudication of bankruptcy against a corporation.

Sanger v. *Upton*, 91 U. S. 56.

In this last case, it was said that a stockholder could not question a decree in bankruptcy against the corporation, "except by a separate and direct proceeding had for that purpose." "As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member, . . . a different rule would be pregnant with mischief and confusion" (91 U. S. p. 59).

The only reason for ever allowing any person to impeach a judgment or decree collaterally is that he is without right to attack it directly.

But not only has a stockholder the right to attack an adjudication in bankruptcy against the corporation directly, but, in this very case, as appears by the copy of the proceedings in bankruptcy annexed to the bill, one Sweatt, a stockholder (see Record, p. 98, near the top), actually has brought a petition to revise the decree of adjudication; and, so far as appears, such petition is still pending. See Record, pp. 95–99.

If this bill, impeaching the bankruptcy proceedings collaterally, could be sustained, these assignees in bankruptcy would be improperly joined as parties; for no relief is sought against them.

(2) But, even if this bill can be regarded not as a bill impeaching the adjudication in bankruptcy collaterally, but as brought directly for the purpose of setting it aside, it is demurrable.

A. It is multifarious. A bill to set aside the adjudication and assignment in bankruptcy cannot be united with the bill to set aside the foreclosure, which last is the main object of these proceedings. With this main object, these defendants have nothing to do. Whatever indefinite allegations of conspiracy may be made do not concern them, for there is no charge or pretence that they were in any manner privy to it. If a conspiracy between the trustees and assignees was charged, then they might all properly be joined in one bill as defendants. But there is no such charge or pretence. The plaintiff desires to set aside the title of the assignees, because, until it is set aside, the stockholders have no standing in court against the other defendants. But that is no reason for dragging the assignees into a litigation with which they have no concern.

B. The most proper mode of obtaining the revocation of a decree of adjudication is by petition to the Bankrupt Court which made the decree.

That the plaintiff has not done.

A not improper mode would be a revising bill or petition to the Circuit Court, under R. S., § 4986, but the plaintiff cannot say that this is such a bill; for, if it is, he has no business here. An appeal cannot be taken from the decree of the Circuit Court on such a bill.

Morgan v. *Thornhill*, 11 Wall. 65.
Cleveland Ins. Co. v. *Globe Ins. Co.*, 98 U. S. 366.

If, therefore, this proceeding can possibly be sustained as framed for the direct purpose of destroying the effect of the bankruptcy proceedings, it must be as an independent bill in equity in the Circuit Court.

That a bill has sometimes been maintained in a court of equity as an independent proceeding to relieve from the consequences of a judgment or decree obtained in another court by fraud is true.

The nature and effect of such a bill are sometimes misstated. The court of equity cannot annul the decree of another court, for it has no authority over it. What it does is to act on the parties who have profited by the fraudulent decree by enjoining them or holding them as trustees for the person defrauded, and thus compel them to do justice. It is an independent proceeding; and, therefore, it is no answer to such a bill in a federal court that the original proceeding was in a State court.

Johnson v. *Waters*, 111 U. S. 640.

That a court of equity has the power to redress fraud by compelling one who has wrongly obtained a judicial decree to hold as trustee for the injured party is well-settled law; but it is equally well settled that a court of equity will not interfere, when redress can be had as effectually in a more direct way.

Nougue v. *Clapp*, 101 U. S. 551.

A familiar example arises in the case of a will procured by fraud on the part of a legatee. Equity has the power to compel the legatee to hold as trustee for the person defrauded, when the latter's rights can be protected in no other way. Thus, if an attorney, being directed to draw a will giving a legacy to A, should insert his own name, equity will compel the attorney to disgorge. But if the

Court of Probate can, by its refusal or grant of probate, perfectly protect the injured person's rights, equity cannot interfere. Thus, if A has by fraud induced the Probate Court to admit to probate as a will a paper which is alleged to be a forgery or to have been made while the testator is insane, the court of equity will not entertain a bill to hold A liable to the heirs. Their remedy is in the Court of Probate.

Allen v. *Macpherson*, 1 H. L. C. 191.
Meluish v. *Milton*, 3 Ch. D. 27.
Broderick's Case, 21 Wall. 503.

When all a person's rights can be protected by the revocation of a fraudulent judgment *in rem*, such as the probate of a will or an adjudication in bankruptcy, they are to be protected by seeking a revocation of that judgment in the court which pronounced it or in a court of appeal, not by an independent bill in a court of equity.

In the present case, every right to have the adjudication in bankruptcy set aside would have been protected by an application to the District Court or by a revising petition to the Circuit Court.

(NOTE.— The objections, aside from fraud, made against the validity of the adjudication in bankruptcy,— namely, that the bankrupt court had no jurisdiction,— have clearly nothing in them.

That a railroad corporation can be adjudged a bankrupt has been settled by this court.

New Orleans, etc., R.R. Co. v. *Delamore*, 114 U. S. 501.

That the person petitioning as creditor for the adjudication was not really a creditor as alleged cannot be inquired into collaterally.

Sloan v. *Lewis*, 22 Wall. 150.
Lamp Chimney Co. v. *Brass & Copper Co.*, 91 U. S. 656.)

V.

The bill purports to be brought on behalf of both stockholders and creditors. The interests of creditors and stockholders in the bankruptcy proceedings are adverse, and the bill is therefore bad for misjoinder of parties.

Ward v. *Sittingbourne R.R. Co.*, L. R. 9 Ch. 488, 494.

See the decree in that case.

VI.

As the defendants' oath is waived, this bill (were there no other objection) cannot be maintained for discovery.

C. S. BRADLEY,
J. C. GRAY,
Of Counsel.

SUPREME COURT U. S.
FILED
APR 12 1886
JAMES H. McKENNEY,
CLERK.

118-161

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 282.

WILLIAM F. GRAHAM ET AL.

v.

THE BOSTON, HARTFORD & ERIE RAILROAD COMPANY ET AL.

BRIEF FOR THE NEW YORK & NEW ENGLAND RAILROAD COMPANY, WILLIAM T. HART, AND CHARLES P. CLARK, THREE OF THE DEFENDANTS.

W. G. RUSSELL,
WILLIAM CALEB LORING,
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BRIEF FOR THE NEW YORK & NEW ENGLAND RAILROAD COMPANY, WILLIAM T. HART, AND CHARLES P. CLARK, THREE OF THE DEFENDANTS.

BRIEF STATEMENT OF THE CASE.

The bill sets forth the following facts: —

1866, March. — The Boston, Hartford & Erie Railroad Company made a mortgage of all its railroads and railroad property, situate in Massachusetts, Connecticut, Rhode Island, and New York, to secure an issue of $20,000,000 of bonds (*pp.* 8–11; *for copy of mortgage, see p.* 41).

1870, Jan. — Default was made in payment of the mortgage interest due for the six months beginning July, 1869 (*p.* 118).

1870, March.— The Company having become insolvent, its property was taken on legal process in eight different suits during this and the four following months (*so alleged in the bankruptcy petition, and not denied. See pp.* 87–91 *and* 104).

1870, July.— A bill was filed, in the name of one George Ellis, in the Supreme Judicial Court of Massachusetts, to foreclose the mortgage (*p.* 17; *for copy of a portion of the record, see pp.* 113–230). Receivers were appointed, and took possession August 2, 1870 (*p.* 18).

1870, Oct.— An involuntary petition in bankruptcy was filed against the Boston, Hartford & Erie Railroad Company (*p.* 74; *for a copy of the petition, see p.* 87). On this petition, the Company was adjudicated a bankrupt (*p.* 75) on March 2, 1871 (*p.* 95), and assignees were duly elected (*pp.* 28 *and* 29), who, after the foreclosure of the mortgage had become perfect, released the rights of the Boston, Hartford & Erie Railroad Company in the mortgaged property to the trustees (*pp.* 28 *and* 33).

1871, Sept.— The trustees entered to foreclose under decrees of foreclosure in the Ellis suits, limiting the time for redemption to eighteen months after entry; and under the terms of the mortgage providing that, if default continued for eighteen months after entry, the right of redemption would be forclosed. *See certificate of entry, p.* 52; *for decree of foreclosure, see p.* 160; *for supplementary order as to these trustees, see p.* 212; *for provision of mortgage, see p.* 134; *for recital of all facts, see p.* 218.

1875, June. — The trustees conveyed the property, the foreclosure having been perfected, to a corporation organized by the bondholders under the name of the New York & New England Railroad Company. (*See recital, p.* 219.)

1880, July.— This bill was filed by a stockholder of the Company in behalf of himself and all of its stockholders and creditors.

The bill, as amended, sought: —

First.— To have the mortgage and the bonds issued under it declared void and set aside.

Or, in the alternative,—

Second.— To have it declared, that the equity of redemption had not been foreclosed; and to have the mortgagee's title, to the property covered by the mortgage, conveyed to new mortgage trustees to be appointed by the court.

The attempt is to set up a title in the Boston, Hartford & Erie Railroad Company to property, which the principal defendant, the New York & New England Railroad Company, now holds under a decree of foreclosure in the Ellis suit, under a foreclosure *in pais* and a conveyance from the assignees in bankruptcy.

The allegations, on which this attempt is founded, purport to show: (A) That the mortgage was originally void; (B) that the Ellis suit and the decrees made therein, and (C) the bankruptcy proceedings and the adjudication and assignment made therein, were all procured by fraud and collusion, and are therefore void.

A. There are two grounds on which it is alleged that the mortgage was void: —

(1) That the meeting authorizing the mortgage was, as it is alleged, held outside of the States which chartered the Company, though it was afterward ratified by the legislatures of those States.

(2) For fraud:

The allegations of fraud are: that the meeting was held in New York, so that as few stockholders as possible might attend, and those present acting in the interest of the Erie Railway might authorize the mortgage, the proceeds of which should be diverted to the Erie Railway, as was done to the extent of $5,000,000, as subsequently stated in the bill. The subsequent statement sets forth, that a sale of $5,000,000 of the bonds was made to the Erie Railway at 80 per cent., paid for by the notes of the Erie Railway, which were discounted by the Boston, Hartford & Erie Railroad Company at disadvantageous rates; and that the proceeds were used in paying losses made in stock speculations carried on for the benefit of the Boston, Hartford & Erie Railroad Company.

In addition, it is alleged that, of the remaining $15,000,000 of the $20,000,000 of bonds issued under the mortgage, nearly five

million were stolen by the president of the corporation; two million and one-half were exchanged for bonds of the State of Massachusetts, and the proceeds of these State bonds were used in completing the road in place of paying underlying liens, as by the terms of the mortgage they should have been used, and the State had notice of this misapplication; that over seven million and one-half were sold, and the proceeds used in retiring underlying liens and completing and equipping the road.

B. The alleged fraud in the Ellis suit is as follows:—

That Lane, being counsel and a director of the Erie Railway and "a holder of a very considerable number of Berdell bonds in his own right," and being desirous of getting control of the Boston, Hartford & Erie Railroad as a feeder to the Erie Railway, brought suits to foreclose the mortgage, in the name of his clerk Ellis; that, afterward, Lane procured his election as President of the Boston, Hartford & Erie Railroad Company, and the election of a Board of Directors favorable to his designs; that Lane "was, during all the proceedings in said suit and in procuring all the interlocutory decrees and orders made in said suit, *dominus litis*, as well plaintiff as defendant." It is not pretended that this fraud was consummated; that the Erie Railway has ever got control of the railroad, formerly owned by the Boston, Hartford & Erie Railroad Company, as a feeder, or otherwise.

It is also alleged that Matthew Bolles and Michael C. Bolles were joined with Ellis, as co-plaintiffs, at the commencement of said suits, and that J. C. Ayer afterward intervened as a party plaintiff in those suits. That these co-plaintiffs were holders of Berdell bonds, is not denied; nor is any fraud alleged against them; but it is alleged that they permitted the management of the suit to be directed by Ellis. It further appears, from the imperfect copy of the record in the Ellis suit annexed to the bill, that the Commonwealth of Massachusetts also intervened as party plaintiff (*pp.* 187, 168); but it is not pretended that the Commonwealth left the management of the suit to Ellis.

It is also alleged that the trustees, who took possession of the road from the receivers in the Ellis suits, so mismanaged the property as to permit a default in the payment of interest upon said Berdell mortgage. But, when those trustees took possession, the interest had already been in default for eighteen months; and it was on that

previous default that the foreclosure was made (*pp.* 160, 165). And, further, it is not alleged what results could have been obtained by good management; there is an allegation in another part of the bill that at some time after March, 1870, the road could have earned the interest on the Berdell bonds, had its assets been used in completing the road. It is not stated that there were any assets, and if there were why they, after March, 1870, were not used in completing the road; but it may be presumed that it was because, if there were any, they were used in paying the more pressing of its creditors. In March, 1870, the road was, confessedly, insolvent.

It is also alleged that the resignations by, and appointments of, trustees under the Berdell mortgage, were invalid, because not accepted by the bondholders or the Railroad Company nor passed upon by any court. There is a further allegation that the cause in the Ellis suit was submitted upon an agreed statement of facts, and "that, in certain important and controlling particulars, the said agreement of facts was not true, and stated certain matters as true that did not in fact exist, and omitted to state facts necessary for the proper determination of the questions submitted, which were well known to Lane and his confederates." But there is no allegation specifying in what the facts alleged were untrue, or what facts alleged did not exist, or what necessary facts were omitted. It appears that the facts stated in regard to the resignation and appointment of the trustees are the same in substance as those set forth by the plaintiff in this bill.

C. The alleged fraud in the bankruptcy proceedings is that:—

Lane, then being President of the Boston, Hartford & Erie Railroad Company, "as part of the fraudulent scheme and conspiracy and the devices hereinbefore set out," furnished one Seth Adams with twenty over-due coupons, and induced him to bring an involuntary petition in bankruptcy against the corporation; that the Directors voted to oppose the petition; that Lane reported to the Directors that he had employed B. R. Curtis, Esq., to oppose the petition, but in fact employed J. G. Abbott, Esq., to consent to it, and Mr. Abbott did consent, and his consent was the sole foundation for the adjudication in bankruptcy.

It appears from the record that Mr. Curtis filed a motion to dismiss the petition for want of jurisdiction; that, from the order on that petition, he took an appeal to the Circuit Court; that, subse-

quently, he withdrew the appeal, and the next day Mr. Abbott consented to the adjudication.

It also appears, from the imperfect copy of the record annexed to the bill, that nineteen days after the withdrawal of the appeal Enoch G. Sweatt, a stockholder and creditor, intervened, and filed his petition in the Circuit Court to contest the adjudication. No allegations are made against the *bona fides* of Sweatt's petition. And no allegations are made touching the honesty of the election of the assignees, or of the release by them to the trustees under the Berdell mortgage of the equity of redeeming the mortgage.

It is to be remarked that no fraud is charged against the body of the bondholders, the present owners of the property. The fraud is that of one of their number, a fraud attempted to be committed, not in their interest, but in the interest of the Erie Railway. Their title is to be avoided, if at all, not for their personal fraud, but because they claim under a decree procured by the fraud of Lane.

To this bill these defendants demurred. Their demurrer was sustained. From the decree sustaining the demurrer, the plaintiffs appealed to this court.

BRIEF ABSTRACT OF THE ARGUMENT.

FIRST DIVISION.

WRONG PLAINTIFF.

I. No proper efforts have been made to induce action by the directors and the corporation, and thereby to lay the foundation for this bill by a stockholder; *pp.* 12–15.

II. So far as the bill seeks to avoid the mortgage, because of an irregularity in the stockholders' meeting which authorized it, and to set aside the decree in bankruptcy, it is not a bill which a minority of stockholders can ever bring. These are acts which the majority can ratify to-day. *pp.* 15–16.

SECOND DIVISION.

TITLE BY DECREE OF FORECLOSURE IN THE ELLIS SUIT.

FIRST POINT.— Apart from fraud, the decree in the Ellis suit is a bar.

I. Apart from fraud, the decree is a bar to a suit by the corporation. *pp.* 16–18.

II. The stockholders are bound by the decree equally with the corporation. *pp.* 18–19.

SECOND POINT.— If the plaintiffs wish to attack the Ellis decrees for fraud, their remedy is to intervene in the Ellis suit in the State court, still pending.

I. So long as the fraudulent decree can be vacated on application to the State court, no bill will lie in another court to obtain possession of the property held under that decree. *pp.* 20–21.

II. The plaintiffs can, by applying to the State court, have the decree in the Ellis suit vacated, if it was obtained by fraud. *pp.* 21–22.

THIRD POINT.— Though it is claimed that the Ellis suit and the decrees made therein are void for fraud, no fraud is alleged either in the prosecution, the defence, or conduct of the suit. *pp.* 22–43.

First Fraud alleged in the Ellis Suit: Fraud in prosecuting the Suit:—

There was no fraud in the prosecution of the suit. *pp.* 22–23.

Second Fraud alleged in the Ellis Suit: Fraud in not defending the Suit:—

Two defences are suggested: (1) that the mortgage was void; (2) that the breach of condition was fraudulently permitted.

First defence.— Defence that the mortgage was void.

First ground on which the mortgage is alleged to have been void: namely, that the stockholders' meeting was held outside of the incorporating States.

I. The Boston, Hartford & Erie Railroad Company was a New York corporation. *pp.* 25–26.

II. The mortgage was ratified by the incorporating States before the mortgage deed was recorded or a bond issued under it. *pp.* 26–29.

III. The Boston, Hartford & Erie Railroad Company is estopped to say that it is not a New York corporation. *pp.* 29–31.

IV. Under the original charters of the Boston, Hartford & Erie Railroad Company, the stockholders could legally meet outside of the incorporating States. *pp.* 31–32.

Second ground on which the mortgage is alleged to have been void: Fraud.

I. The allegation of a fraud in the mortgage by a sale of $5,000,000 of the bonds to the Erie Railway is not an allegation of a fraud: the sale was not a fraud. *pp.* 34–35.

II. The issue of the remaining $15,000,000 of the bonds was not fraudulent. *pp.* 35–37.

III. If a portion of the bonds were invalid, that fact was immaterial in the Ellis suit, and was so treated by the court in that suit. *p.* 37.

IV. If all the bonds were originally void for fraud, all the then holders of all the bonds must have taken with notice of the fraud, to make that fact a defence in the Ellis suit; but there is no allegation in this bill that the holders had such notice. *pp.* 37–38.

Third ground on which the mortgage is alleged to have been void: Want of authority.

The votes recited on the face of the mortgage show that authority was given. *p.* 38.

Second defence.— Defence that the breach of condition was fraudulently permitted.

The mortgage was foreclosed on breaches which happened before the Ellis suit was brought; *i.e.*, before the alleged fraud was planned. *pp.* 39–40.

Third Fraud alleged in the Ellis Suit: Fraud in the conduct of the Suit.

I. The question of the validity of the appointment of the then trustees under the Berdell mortgage was raised in the Ellis suit. *pp.* 41–42.

II. The general allegation that the Agreement of Facts in the Ellis suit was untrue, without alleging in what it was untrue, is bad for uncertainty. Furthermore, the Agreement of Facts annexed as part of the record in the Ellis suit, states the facts as they are stated in this bill. *p.* 42.

III. On the facts stated in this bill, the appointment of the trustees was legal. *p.* 42.

SUMMARY OF THE ALLEGED FRAUD IN THE ELLIS SUIT.

The Ellis suit was prosecuted by *bona fide* bondholders, was properly conducted and resulted in a foreclosure of the mortgage, to which there was no defence, for the benefit of the bondholders who are now in possession of the property. *p.* 43.

FOURTH POINT.— If there ever was a right to attack the Ellis decrees for fraud, it has been lost through *laches*.

I. The corporation is barred by *laches*. *pp.* 43–45.

II. The objection of *laches* is not cured by the intervention, as a co-plaintiff, of M. T. Raymond, who was under the disability of minority when the bill was brought. *pp.* 45–47.

THIRD DIVISION.

TITLE BY FORECLOSURE IN PAIS.

FIRST POINT.— The mortgage is clearly a valid mortgage in part, at least: of that mortgage, a foreclosure *in pais* has been made.

I. That the mortgage is not void, because the meeting of stockholders was held in New York or for fraud, has been already shown. *pp.* 47–48.

II. Of this mortgage, a valid foreclosure *in pais* has been made. *pp.* 48–51.

SECOND POINT.— If the foreclosure *in pais* was defective, the right to avoid it has been lost by *laches*.

I. The general doctrine of *laches* has been discussed. *p.* 51.

II. This bill is within the decided cases. It was brought more than seven years after the foreclosure became perfect. *p.* 51.

FOURTH DIVISION.

TITLE BY RELEASE OF THE EQUITY OF REDEMPTION FROM THE ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

FIRST POINT.— Wrong forum. The plaintiff's remedy is by a supervisory petition to the Circuit Court.

I. That the plaintiffs are barred by the decrees in bankruptcy equally with the corporation has been already demonstrated. *p.* 52.

II. The general doctrine that an original bill to obtain possession of property held under a decree obtained by fraud will not lie, if the fraudulent decree can itself be vacated, has been discussed above. If the decrees in the bankruptcy are void for fraud, the plaintiffs can have them vacated by bringing a supervisory petition in the Circuit Court, under Rev. Sts., § 4986. *p.* 52.

SECOND POINT.— No fraud is alleged which will make the bankruptcy proceedings void.

I. The only fraud alleged in bringing the petition was an ulterior notice of Lane, which was never accomplished. *p.* 53.

II. Though it is claimed in the bill that the petition was in substance a voluntary petition, the facts stated show that it was not. *pp.* 53–54.

III. Lane's ulterior motive at this stage of the proceedings (to wit, after the election of honest assignees by honest creditors) is immaterial. *pp.* 54–55.

IV. There was no fraud in the defence of the bankruptcy proceedings. *pp.* 55–56.

THIRD POINT.— Putting the legal effect of the allegations of fraud at the highest, the assignment in bankruptcy was valid; and the right to bring this bill thereby passed to the assignees in bankruptcy, *i.e.*, the general creditors of the corporation. *pp.* 56–57.

FOURTH POINT.— If the adjudication in bankruptcy was procured by fraud, it is voidable, not void, and it is now too late to avoid it.

I. Judgments procured by fraud are voidable only, and cannot be avoided as against third persons. *p.* 57.

II. In the case at bar, the present holders of the property are third persons. *pp.* 57–58.

FIFTH POINT.— If the decrees in bankruptcy are void, the right to avoid them has been lost by *laches*.

I. The general doctrine of *laches* has been discussed above. *p.* 58.

II. This bill is within the decided cases. It was brought more than nine years after the adjudication in bankruptcy. *p.* 58.

III. The objection of *laches* is not cured by the general allegation of ignorance. Had reasonable care been used in investigation, the fraud must have been known. *pp.* 58–59.

FIFTH DIVISION.

OTHER DEFECTS IN THIS BILL.

If the mortgage is valid in part, the bill is bad because it is not a bill to redeem.

If the mortgage is wholly void, it can only be because the stockholders met in New York. They can to-day meet in Connecticut, and ratify the mortgage. Therefore this bill by a minority of stockholders is bad.

These two objections go to the whole bill.

I. A mortgagee can never be made a party to a suit in equity, except for the purpose of redeeming him. *pp.* 59–60.

II. The only ground on which it can be contended that the mortgage is wholly void is that the stockholders met in New York. As the stockholders can meet to-day and ratify the mortgage, this bill by a minority of them will not lie to set it aside. *p.* 60.

SIXTH DIVISION.

ALLEGATIONS NOT POSSIBLY TRUE OR INCONSISTENT WITH OTHER ALLEGATIONS IN THE BILL.

I. Allegations as to the Ellis suit not possibly true or inconsistent. *pp.* 61–64.

II. Allegations as to the Bankruptcy Proceedings not possibly true or inconsistent. *pp.* 64–66.

III. Incompleteness of the so called copies of the record of the Ellis suit and of the Bankruptcy Proceedings. *p.* 66.

FIRST DIVISION.

WRONG PLAINTIFF.

I.

The plaintiff has not shown that proper efforts have been made to induce the corporation to bring this bill, and so lay the foundation for the bill being brought in the name of the stockholders. This objection is open on demurrer.

Hawes v. *Oakland*, 104 U. S. 450, 460.
Dimpfell v. *Ohio & M. R.R. Co.*, 110 U. S. 209.

1. He has not stated with particularity the efforts which he made to induce the directors to bring the bill.

From the statement of his efforts, they appear to have been simulated, not earnest.

The allegation is that "he requested of and demanded from the President and Directors of respondent, the Boston, Hartford & Erie Railroad Company, that they should bring a suit or take such legal

proceedings as were necessary for the purpose of securing to said Boston, Hartford & Erie Railroad Company and its stockholders and creditors the redress and relief which your orator seeks in this bill or such other relief as they may be advised; but that said President and Directors have hitherto neglected and refused, and still neglect and refuse, to bring such suit or take any legal proceedings therefor." (*p.* 3.)

It does not appear that, at the time that this request was made, the facts stated in the bill, or any facts justifying the bringing of an action, were laid before the Directors.

There is no statement of the reason given by the Directors for not suing, and the cause of the failure in the plaintiff's efforts to induce action by the Directors.

Perhaps it was because sufficient time did not elapse after the request and before the filing of the bill, to enable the Directors to give the matter proper consideration. From the allegations of the bill, the plaintiff may have filed it in less than an hour after the request was made.

Perhaps it was because the plaintiff informed the Directors that their corporation had been duly adjudicated a bankrupt, and an assignment of all their property, including the right to bring this action, had been made, and assignees duly chosen in bankruptcy. The plaintiff could not have told the Directors that all the bankruptcy proceedings were void for fraud, because in the amendment to the bill he alleges that when the bill was brought he did not know of the fraud. It is significant, too, that the plaintiff made oath to the truth of the original bill setting up the bankruptcy, but has forborne to swear to the amendment setting up the fraud. (*See p.* 28; *for oath, see p.* 40.)

A naked request to bring a suit for the purpose of securing the relief sought by the present bill, or any other relief the Directors thought best, coupled with an allegation that they neglected and refused to do so, does not fulfil the rule in *Dodge* v. *Woolsey*, 18 How. 331, much less that in *Hawes* v. *Oakland.*

2. It is not pretended that any effort was made to obtain action by the stockholders; and no reason is alleged why this could not have been done, or why it is not reasonable to require it. It is ten years since the road passed out of the possession of the Company. No irreparable damage would have occurred, had the filing of this bill been delayed until a stockholders' meeting had been called.

At no time, since the frauds complained of were committed by Lane, to the filing of this bill, is it pretended that the Directors or the stockholders were under the control of Lane. On the contrary, it appears that, immediately after the petition in bankruptcy was filed, the Board of Directors was acting in opposition to Lane.

3. It appears that the plaintiffs were not the owners of their shares in May, 1871, when the decree of foreclosure in the Ellis suit was made; much less, when the petition in bankruptcy was brought in 1870, and the adjudication made in March, 1871; and again much less, when the mortgage was made in 1866.

Graham seems to have owned five hundred (500) shares since 1878; the allegation is that he has owned them for several years last past (*p.* 3); two years are "several years."

The presumption would seem to be that they were bought for the purpose of bringing this suit.

"And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the Company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the Company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive." Field, J., in *Dimpfell* v. *Ohio & M. R.R.*, 110 U. S. 209, 210.

Raymond is alleged to have acquired by gift one hundred (100) shares in 1872 (*p.* 68). This may well be a year and one-half after the decree of foreclosure.

Kelly found, in 1881, certain shares among the assets of his ntestate (*p.* 73).

Carey, the other stockholder, who asked to intervene, never did so. The order on his petition and that of Raymond provided that they might intervene, "upon filing supplemental complaints in apt words to make them such" (*p.* 69). Carey never filed such a supplemental complaint, though Raymond did (*p.* 69).

4. It is not alleged that the suit is not a collusive one, to confer

on a court of the United States jurisdiction in a case, of which it would not otherwise have cognizance.

It is obvious that this suit is brought in the name of an alien stockholder, because the Boston, Hartford & Erie Railroad Company could not sue in the United States courts on the ground of citizenship.

II.

As a bill (1) to set aside the mortgage (on the ground that the meeting at which it was authorized was void) and (2) to set aside the adjudication in bankruptcy, this bill is not a bill which a minority of the stockholders can ever bring, not even after proper efforts have been made to induce action by the corporation.

Making the mortgage and consenting to the adjudication are acts which are unquestionably within the powers of the Company.

The plaintiffs are an infinitesimally small minority of the stockholders. They own among them six hundred shares. The capital stock is, by the terms of the original charter, $10,000,000; (*Conn. St.* 1863, § 2, *Brief, p.* 72). They own less than two-thirds of one per cent. of the capital stock.

While the court is declaring that the mortgage and the adjudication in bankruptcy are void, at the suit of these plaintiffs who represent less than one per cent. of the capital stock, the other stockholders, representing more than 99 per cent., may vote to ratify the mortgage and the consent on which the adjudication in bankruptcy was founded. If they do, their action is binding on the minority and on the court; for it is not pretended that the majority are now, or ever were, acting fraudulently in respect to the mortgage. It is not alleged that Lane and his confederates owned or controlled a majority of the stock.

Hawes v. *Oakland*, 104 U. S., at pp. 461, 462.
Samuel v. *Holladay*, Woolw., at pp. 417, 420.

"While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The

very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained while that body retains its functions." Wigram, V. C., in *Foss* v. *Harbottle*, 2 Hare, 461, 494.

"Is it not better that the rule should be adhered to that, if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this: that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Alston* v. *Mozley* and *Foss* v. *Harbottle*. In my opinion, that is the rule that is to be maintained. Of course, if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this court to maintain their rights; but, if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside or to institute a suit in chancery about it, except the Company itself." Mellish, L. J., in *McDougall* v. *Gardiner*, 1 Ch. D. 13, 25, 26.

SECOND DIVISION.

TITLE BY DECREE OF FORECLOSURE IN THE ELLIS SUIT.

This title goes to the whole bill, and is good against these plaintiffs as parties to the suit.

FIRST POINT.

Apart from the allegations of fraud, it is clear that the decree in the Ellis suit is a bar.

I.

Apart from fraud, it is clear that, if the attempt, made in this bill, to set aside the mortgage, or (in the alternative) the foreclosure thereof, had been made by the corporation itself, the decree of foreclosure made in the Ellis suit would have been a bar.

A. The invalidity of the mortgage, or the fact that there was no breach of the condition, might have been set up in defence of

the suit, and therefore are concluded by the decrees of foreclosure made therein.

Stout v. *Lye*, 103 U. S. 66.
Life Insurance Co. v. *Bangs*, 103 U. S. 780.
Freison v. *Bates College*, 128 Mass. 464.
Shears v. *Dusenbury*, 13 Gray, 292, 293.
Haven v. *Grand Junction Railroad Co.*, 12 Allen, 337, 340.
Ramsden v. *Jackson*, 1 Atk. 292, 293.

B. This position is not affected by the allegation that "no final adjudication has been made of the pretended rights of the parties thereto."

Farquharson v. *Seton*, 5 Russ. 45.
Gregory v. *Molesworth*, 3 Atk. 626.

(*a*) Though the pendency of a suit in a State court between the same parties, and involving the same subject matter, is no bar to a suit in a court of the United States, "a judgment on the merits in one may be used as a bar to further proceedings in the other."

Stout v. *Lye*, 103 U. S. 66, 68.

(*b*) There may be a judgment on the merits and a final decree, though the cause is not finally disposed of.

St. Louis, etc., R.R. v. *So. Ex. Co.*, 108 U. S. 24.
Winthrop Iron Co. v. *Meeker*, 109 U. S. 180.
Williams v. *Morgan*, 111 U. S. 684.

C. In the case at bar a decree *nisi* for the foreclosure of this mortgage was made on May 9, 1871; this decree followed the terms of the mortgage, which had become, by statute ratification, the law for its foreclosure (*p.* 160). That this is a final decree, see *Whiting* v. *Bank of U. S.*, 13 Pet. 6, 15. This decree is a bar, and concludes the mortgagor (the Boston, Hartford & Erie Railroad Company), from contesting the validity of the mortgage and the fact that there was then a breach of the condition.

The final order confirming the foreclosure upon the continuance of the default, is not annexed, because the record of the Ellis suit annexed to the bill is not complete; but it directly appears that the default did continue and indirectly appears that there was such an order. It is recited in the order discharging the receivers that the breach continued (*p.* 218); it is also recited that the equity

having become "forever barred and foreclosed," the trustees were directed by a decree of June 12, 1875, to convey the railroad to the new corporation,— the New York & New England Railroad Company (*p.* 219).

II.

The stockholders are barred by that decree equally with the corporation.

Sanger v. *Upton*, 91 U. S. 56.

A. The rights, which the plaintiffs seek to enforce in this bill, are the rights of the corporation.

It is not an action by a stockholder to enforce his own rights, but an action to enforce the rights of the corporation, brought in the name of the stockholder, solely on the alleged ground, that those in control of the corporation, wrongfully refuse to enforce the rights of the corporation.

This distinction is clearly stated by Miller, J., in *Hawes* v. *Oakland*, 104 U. S. 450, 453, 454.

The character of the action is well stated by Wells, J., in *Brewer* v. *Boston Theatre*, 104 Mass. 378, 386, who said that it was an action "in the name of other parties than the corporation whose interests alone are affected directly, whose rights are to be vindicated, and to whose use exclusively the judgment, if recovered, must enure."

In the Ellis suits, the rights of the corporation were maintained in court by the corporation.

In this suit (if properly brought), the rights of the same corporation are maintained by the stockholders, suing in the name of their representatives, Graham and Raymond.

In both cases, the rights of the same corporation are being maintained for the benefit of the same corporation.

B. But it is said the stockholders were not parties to the Ellis suit.

Had the defence in the Ellis suits been carried on in the name of one stockholder as the representative of all stockholders, because the class was too numerous to join all as parties (as this suit is car-

ried on), the class would have been bound by the judgment. They would have been parties to the first suit through their representative; and, on proper application, they could have become parties in person, and thereby obtained the right "to make defence, to examine witnesses, or to appeal."

Kerrison v. *Stewart*, 93 U. S. 155.
Corcoran v. *Chesapeake, etc., Canal Co. R.R.*, 94 U. S. 741.
Shaw v. *Railroad*, 100 U. S. 605.
Campbell v. *Railroad Co.*, 1 Woods, at p. 377.
Farquharson v. *Seton*, 5 Russ., at p. 63.

In a much stronger sense are stockholders represented by the corporation, in which they are stockholders, than bondholders by their pre-appointed representative, or the members of a numerous class by a self-appointed representative.

Railway Co. v. *Alling*, 99 U. S. 463.

Another instance, where a person is bound by a decree because it was defended by his representative, is a decree against a predecessor in title.

Stout v. *Lye*, 103 U. S. 66.

To hold that a judgment obtained by a third party against a corporation can be collaterally attacked in a suit by a stockholder, as the representative of all the stockholders, would be to lose sight of the true character of such a stockholder's suit; and it would throw on persons, who have obtained a judgment against the corporation, a very onerous burden, by reason of an exception to the rules of pleading allowed in equity, only to relieve stockholders from the injustice practised on them by their own directors in not bringing the second suit. Full effect is given to the exception, which allows stockholders to sue in their own names, if it is held that the stockholders can enforce the rights of the corporation, subject to the same burdens as the corporation would be subject to, had the second suit been in its name.

SECOND POINT.

If the plaintiffs wish to attack the decree of foreclosure for fraud, they should intervene in the Ellis suit, which is still open in the State court, show the fraud, and have the decree vacated, as was done in *Thomas* v. *Brownville Railroad*, 109 U. S. 522.

I.

Inasmuch as this remedy is open to them, there is no ground for a bill to deprive this defendant of the property held under the decree; in other words, inasmuch as the plaintiffs can have the decree vacated, they cannot attack the decree collaterally.

Allen v. *McPherson*, 1 H. L. 191, cited with approval in
Broderick's Will, 21 Wall. 503, 511.
Mitford, Eq. Pl. (5th ed.) [131].
Barnesley v. *Powel*, 1 Ves. Sen. 284, 289.

It is often said that, when a decree has been obtained by fraud, the remedy is by a bill in equity.

That is true; but there are two classes of bills in equity which deal with decrees procured by fraud. The two are sometimes treated as one, but they are entirely distinct and separate.

One is a bill to have the decree vacated; and *ex vi termini* can only be filed in the court which passed the original decree, for no other court could vacate it; Baggallay, L. J., in *Flower* v. *Lloyd*, 6 Ch. Div. 297, 302. It is not an original bill, but a bill ancillary to the original bill, and belongs to the same class as cross bills, bills of review, bills in the nature of bills of review, bills to suspend a decree for matters happening subsequent thereto, bills to carry a former decree into effect, bills in the nature of bills of revivor, and bills in the nature of supplemental bills. Mitford, Eq. Pl. (5 ed.), [33], [35], and [93]; Story, Eq. Pl., § 16, § 388, and § 426. An example of this class of bills is to be found in *Pacific R.R. of Mo.* v. *Missouri Pac. R.R.*, 111 U. S. 505.

The other class of bills, which deal with decrees obtained by fraud, are bills which do not seek to deal with the decree itself, but to deprive the possessor of the property held under the decree. These bills proceed upon the ground that, inasmuch as the decree cannot be vacated, to allow the party who obtained it to continue to hold the property gained by it, would be to allow him to use the decree to perpetrate a fraud. Mitford, Eq. Pl. [131]; Kerr on Fraud and Mistake (2d ed.), 398, 401; Ld. Westbury in *McCormick* v. *Grogan*, 4 Eng. & Ir. App. 82, 97; (Story's Eq. Jur., §§ 1570–1573, cited in *Johnson* v. *Waters*, 111 U. S. 640, 667, was written by Judge Redfield; see note 1 to p. 775 of Vol. II., 12th ed.).

This is an original and independent bill, and can be filed in any court. *Johnson* v. *Waters*, 111 U. S. 640, is an example.

The ground on which this court has upheld the jurisdiction in equity in case of the second class of bills shows that they cannot be maintained, if there is still an opportunity to present the fraud to the court which made the decree and have it vacated.

"In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." Miller, J., in *U. S.* v. *Throckmorton*, 98 U. S. 61, 66.

And, again, in *Johnson* v. *Waters*, 111 U. S. 640, 669, Mr. Justice Bradley says that "this court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had an opportunity to litigate" in the State court.

If the defrauded party still has an opportunity of showing the fraud to the court which made the decree, there can be no bill on the ground that he "has been prevented from presenting all of his case to the court."

If the original decree can still be vacated, there can be no bill on the ground, that, if the bill is not maintained, the other party can use the decree to perpetrate a fraud.

It is only when the court which passed the original decree has, in fact, refused to vacate it on the ground that it has no such power (*Metcalf* v. *Williams*, 104 U. S. 93), or it is made to appear that it has no such power (*Paddock* v. *Palmer*, 19 Vt. 581; *Wells* v. *Bridgeport*, 30 Conn. 316), or when the vacating of the decree would not effect the end (*Mariot* v. *Mariot*, 1 Stra. 666), that there is ground for a bill of the second class.

There is no case in this court, where a bill of the second class has been maintained, when fraud could have been effectually shown to the court which made the original decree.

decree, they can bring a bill of the first class (called in Massachusetts practice a bill of review) to vacate the decree for fraud.

Of this there is no doubt:

Elliott v. *Balcolm*, 11 Gray, 286.

The right of any court in Massachusetts to vacate a decree for fraud after the term has expired is clear, whether it is a court of law, probate, or equity.

Edson v. *Edson*, 108 Mass. 590.
Capen v. *Stoughton*, 16 Gray, 364.
Elliott v. *Balcolm*, 11 Gray. 286.
Stickney v. *Davis*, 17 Pick. 169.

THIRD POINT.

Though the bill is full of the words conspiracy, collusion, and fraud, and of vague and general charges of confederation, upon the facts alleged in respect to the Ellis suit, the suit and the decrees are not void for fraud.

The allegations of the bill are found on *pp.* 17–22.

First Fraud alleged in the Ellis Suit: Fraud in prosecuting the Suit.

On the facts alleged, the Ellis bill was honestly prosecuted as a bill to enforce the rights of the Berdell bondholders.

It is admitted that, when the bill was brought, the interest on the Berdell mortgage had been in default for over a year (*it is so alleged in Ellis's bill and not denied, p.* 118). It is admitted that the Berdell bonds on which the bill was brought were valid bonds (*there is no allegation to the contrary*).

The fraud alleged is that the bonds held by Ellis were Lane's, and that he caused the suit to be brought in order to get possession of the road as a feeder to the Erie Railway.

But Lane, as the owner of valid bonds, with one year's interest overdue (and the coupons representing that interest), had the right to bring a bill to foreclose the mortgage. And, if that bill was brought in the interest of the Erie Railway in place of in the interest of the bondholders, the fraud was a fraud on the bondholders, not on the corporation mortgagor and its stockholders.

As the coupons were negotiable, Lane had the right to make Ellis the holder of them, in order that Ellis might bring a suit for his benefit.

Law v. *Parnell*, 7 C. B. (N. S.) 282.
Ancona v. *Marks*, 7 H. & N. 686.
Wheeler v. *Johnson*, 97 Mass. 39.

There is no allegation that the bonds on which Matthew and Michael Bolles, who were originally co-plaintiffs, were not their own property.

Though the Ellis suit in its inception is alleged to have been a suit brought for an ulterior purpose, in the interest of the Erie Railway, that purpose was not accomplished; the suit was prosecuted in the interest of the bondholders.

After the suit was begun by Ellis and Matthew and Michael Bolles, J. C. Ayer and the Commonwealth of Massachusetts intervened as co-plaintiffs (*for allegation as to Ayer, see p.* 18; *for petition of Commonwealth, see p.* 187; *that it afterwards acted as a party, see p.* 168).

The only ground on which such intervention could have been allowed, was to secure the honest prosecution of the suit and a fair representation of the rights of bondholders; and, so long as it was so prosecuted, the intervening parties had no occasion to interfere with the conduct of the suit by Lane.

Though after the intervention of Ayer, it is alleged that Lane continued to conduct the suit, there is no such allegation as to the conduct of the suit after the Commonwealth holding $4,000,000 of the bonds (*p.* 42) intervened. And the suit has been confessedly prosecuted to a foreclosure in the interest of the bondholders, and not of the Erie Railway. The bondholders, not the Erie Railway, are now in possession of the property; and the road is not and never has been used as a feeder to the Erie.

If the suit was begun in fraud, it was not a fraud on the plaintiffs; and the fraud was not consummated.

Alabama v. *Burr*, 115 U. S. 413.
Atlantic Delaine Co. v. *James*, 94 U. S. 207, 214.
Grymes v. *Saunders*, 93 U. S. 55.
Morgan v. *Bliss*, 2 Mass. 111.

Second Fraud alleged in the Ellis Suit: Fraud in not defending the Suit.

It is not shown that any fraud was practised on the corporation in the defence of the suit.

It is true that there is an allegation that, after the suit was brought, Lane, by procuring his election as president, secured control of the defence of the suit (*pp.* 18, 19); and perhaps it may be not unreasonably inferred, that he would have omitted to set up a defence, had there been one to set up.

But there is nowhere in the bill an allegation, that there was a defence; and the allegations as to the mortgage and the default, scattered promiscuously throughout the bill, would not, if set up, have constituted a defence.

The bill undertakes to allege (1) that the mortgage was void, and (2) that the breach of the condition of the mortgage was fraudulently permitted.

First Defence: Defence that the Mortgage was Void.

The bill undertakes to allege that the mortgage was void on three grounds, to wit: —

1st. That the meeting of the stockholders, at which the vote authorizing the mortgage was passed, was held outside of the States by which the corporation was chartered.

2d. That the mortgage was a fraud on the stockholders.

3d. That the stockholders never authorized the making of the mortgage.

First ground on which the mortgage is alleged to be void; viz., that the stockholders' meeting was held outside of the incorporating States.

ALLEGATIONS OF THE BILL.

"And your orator is informed and believes, and therefore avers, that said mortgage was made and authorized at a meeting of the stockholders in the city of New York, in pursuance of some notice, the particulars of which your orator is ignorant, in the office of the Erie Railroad, a corporation duly established in the State of New York, and whereof Robert H. Berdell, one of the trustees herein named, was president; that said Boston, Hartford & Erie Railroad was not a corporation of the State of New York, but a corporation created by the statutes of Connecticut, Massachusetts, and Rhode

Island, and said meeting ought to have been held in one or all of said States and not in the State of New York" (*p.* 10).

I.

The Boston, Hartford & Erie Railroad Company was a New York corporation.

The act authorizing the sale of the Boston, Hartford & Erie Railroad Extension Company and of the Ferry Company to the Boston, Hartford & Erie Railroad (N. Y. St. 1864, *c.* 385, *p.* 80 *of this brief*) is similar to that passed upon by this court in *Clark* v. *Barnard*, 108 U. S. 436, under which this court has expressly held that this corporation was a Rhode Island corporation.

"It was thereupon further enacted that the 'said Boston, Hartford & Erie Railroad Company, by that name, shall and may have, use, exercise, and enjoy all the rights, privileges and powers heretofore granted and belonging to said Hartford, Providence & Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State.' The Hartford, Providence & Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston, Hartford & Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in [its] respect to its railroad in Rhode Island a corporation in and of that State." *Barnard* v. *Clark*, 108 U. S. 436, 449; see also pp. 451–452.

That a sale was made under this act of New York appears from the allegation in the bill, that, in 1866, when the mortgage was made, its location extended to the Hudson River (*p.* 9), while, under its previous charters, it reached no further west than the "line of the State of New York" (*p.* 6, *line* 7); and that there is no other charter to the Boston, Hartford & Erie Railroad Company in New York. The mortgage was ratified by the legislature of New York (N. Y. St. 1866, *c.* 789, *Brief, p.* 81). The mortgage and all the resignations and appointments of trustees were recorded in New York (*pp.* 34 and 54). The rights of the Boston, Hartford & Erie Railroad Company in New York were declared to be vested in the New York & New England Railroad Company, and the time for the completion of its railroad extended (N. Y. St. 1873, *c.* 550, *Brief,*

p. 81). See also Woodruff, J., in *In re Boston, Hartford & Erie R.R. Co.*, 6 N. B. R. 222, 229–230.

II.

The mortgage was valid, because the meeting of the stockholders in New York was legalized, and the mortgage was ratified by the legislatures of Massachusetts, Connecticut, Rhode Island, and New York, before the mortgage deed was recorded, or any bonds were issued under it.

Mass. St. 1866, *c.* 142, *Brief, p.* 67.
Conn. St. 1866, May 11, *Brief, p.* 72.
R. I. St. 1866, January Session, *Brief, p.* 77.
N. Y. St. 1866, *c.* 789, *Brief, p.* 81.

In these States, acts of incorporation are public acts.

Mass. Pub. Sts. *c.* 170, § 68, *Brief, p.* 71.
Conn. Gen. Sts. *c.* 7, § 1, *Brief, p.* 75.
R. I. Pub. Sts. *c.* 24, § 15, *Brief, p.* 79.

When acts of incorporation are public acts, amendments and supplements to them are also to be deemed public acts.

New Jersey v. *Lard*, 95 U. S., at *p.* 112.
State v. *Bergen*, 34 N. J. L. 438, 439.

The United States Courts will, therefore, take judicial notice of these statutes.

Covington Bridge v. *Shepherd*, 20 How. 227, 232.

A. Not only the mortgage, but the "proceedings" were ratified.

As the mortgage on its face states that the meeting was held in New York (*p.* 41), that fact was a part of the "proceedings" known to the legislatures and ratified by them.

B. Had the charters in Massachusetts, Connecticut, and Rhode Island authorized the stockholders to meet in New York, there would have been no question of the legality of this meeting.

The subsequent ratification before the mortgage deed was recorded, or any bonds issued under the mortgage, is equivalent to an original authority.

Grenada County Supervisors v. *Brogden*, 112 U. S. 261.
Galveston Railroad v. *Cowdreff*, 11 Wall., at *pp.* 474, 475.
Anderson v. Santa Anna, 116 U. S. 356.

That the confirmatory acts were passed before the mortgage deed was recorded and before any bonds were issued, is clear.

The mortgage deed was recorded for the first time on Sept. 13, 1866 (*p.* 54); it was then recorded in the Registry of Deeds for Suffolk County, Massachusetts. The mortgage was ratified in Massachusetts, April 12, 1866 (*Brief, p.* 68) (*the date of the recording of the mortgage is not directly stated in the bill; but the dates of the record of the appointment of Berdell, Gregory, and Davis is alleged, and their appointment was made in and by the mortgage itself*). The mortgage was recorded in Rhode Island, Aug. 29, 1867; in Connecticut, Sept. 18, 1867, in New York, Sept. 28, 1867, and February, 1868 (*p.* 54); and the mortgage was ratified in all these States in 1866. See *Brief, p.* 73 *for Conn. Act; Brief, p.* 77 *for R. I. Act; Brief, p.* 81 *for N. Y. Act.* And further all the confirmatory acts provided for the manner in which the mortgage should be recorded; Mass. St. 1866, *c.* 142, § 3, (*Brief, p.* 68); Conn. St. 1866, § 3, (*Brief, p.* 73); R. I. St. 1866, § 3, (*Brief, p.* 77); N. Y. St. 1866, *c.* 789, § 2, (*Brief, p.* 81).

No bonds were issued until after Feb. 27, 1867 (*p.* 168, *line* 4); the confirmatory acts were all passed in 1866. And again by §§ 2 of the Acts of Massachusetts, Connecticut, and Rhode Island, the holders of certain underlying bonds were given the right to exchange them for Berdell bonds "whenever and as soon as any bonds authorized to be issued under said indenture shall be created, issued, and negotiated." The confirmatory act in New York was passed April 24, 1866; that is, before the act was passed in Connecticut,—to wit, May 11. And by § 1 of the confirmatory act in Connecticut authority is given to "create issue and dispose of the mortgage bonds." (*Brief, p.* 73.)

1. In this case, the objection cannot be made that the maker of bonds void for an irregularity, is made to pay them, though he never had the benefit of them.

It is stated in general terms in the bill that the proceeds of the bonds were in part illegally used. But it appears that the $9,900,000 of underlying bonds outstanding at the date of the mortgage (*see p.* 7) were reduced to something over $2,500,000 (*see p.* 16), and that, in addition, "a small portion . . . have been used in completing and equipping said road" (*p.* 16).

And in this case, as in *Grenada* v. *Brogden*, the irregularity was

cured before the bonds were issued. At the time that the confirmatory act was passed, no such objection could have been made; and the subsequent misapplication could not undo, what the confirmatory act had done. See also Anderson v. Santa Anna, 116 U. S. at pp. 363, 364.

2. Neither can the objection be made that the act imposes a liability on the corporation, to which it never consented.

The stockholders who met in New York consented,—that is sufficient; even if it is true that at the time of the meeting their action was not the action of the corporation. The consent given at an election, for which there was no suggestion of legal authority, was held, in *Grenada* v. *Brogden*, *ubi supra*, to be sufficient ground for upholding a confirmatory act, under a constitution, which forbade the legislature authorizing a subscription, unless two-thirds of the voters should assent at a special or regular election.

C. The act confirming the mortgage will be presumed to have been passed upon the application of the Company, especially as it was passed before the bonds were issued, and presumably for the purpose of enabling the Company to issue them.

"After the execution of this mortgage, and six years previous to the taking of the property of the defendant, this same mortgage was ratified and confirmed by a legislative act. . . . This act, it may be supposed, was passed with the knowledge and concurrence and upon the application of the Railroad Company, or those legally representing them. Its authority has never been questioned by the corporation. We are satisfied that the legislature intended to confirm and sanction this identical mortgage, in all its provisions, as a legal act on the part of the Railroad Company, and thus to give greater security to the bondholders, and incidentally to benefit the Company, by removing all doubts as to the validity of the mortgage and the security in the hands of the trustees."

Howe v. *Freeman*, 14 Gray, 566, 576.
Shaw v. *Norfolk County R.R.*, 5 Gray, 162, 180.

The objections to the mortgage in *Howe* v. *Freeman*, which the confirmatory act was held to have removed, were: (1) That the stockholders' vote authorized a mortgage of the railroad, not of the personalty; and (2) that by the laws of Massachusetts a mortgage of after-acquired personalty was inoperative. The property in question in that case was after acquired personalty.

D. The mortgage has again been ratified in Massachusetts, Connecticut, and New York, by the acts which ratified and confirmed the organization of the New York & New England Railroad Company, and authorized a conveyance to that corporation by the trustees under the mortgage, and declared that the effect of the conveyance should be to vest in said corporation all the rights, powers, and franchises of the Boston, Hartford & Erie Railroad Company.

Mass. St. 1873, *c.* 289. *Brief, p.* 69.
Conn. St. 1873, May 29. *Brief, p.* 73.
R. I. St. 1873, May Session. *Brief, p.* 78.

In New York, the benefit of an extension of time for the completion of the Boston, Hartford & Erie Railroad has been declared to vest in the New York & New England Railroad Company, and the organization thus confirmed.

N. Y. St. 1873, *c.* 550. *Brief, p.* 81.

III.

The Boston, Hartford & Erie Railroad Company is estopped to say that it is not a New York corporation, and that the meeting was not duly held in New York.

The title of the mortgage describes the Boston, Hartford & Erie Railroad Company as "a corporation existing under the laws of the States of New York, Connecticut, Rhode Island, and Massachusetts"; and the recital states that the mortgage was authorized "at a meeting duly and lawfully called and held at the city of New York."

Conceding (for the sake of the argument) that the day after the mortgage was made the Company might have said: "This corporation is not a New York corporation; the meeting in New York was a nullity; the mortgage deed is not the deed of the corporation, and its statements and recitals are not the statements and recitals of the corporation: it is the deed of persons assuming, without right, to act in the name of the corporation; and the statements it contains are their statements, not our statements." To-day, the corporation cannot set up that claim: they are estopped by their silence to say that the deed is not their deed and the statements not their statements.

The corporation has stood silent for fourteen years, while this mortgage and the resignations and appointments of the trustees under it were spread upon the public records (*pp.* 54 *and* 55); while $20,000,000 of negotiable bonds secured by it have been put on the public market; while the proceeds of $7,400,000 were used in wiping out its underlying liens, and $2,750,000 more were used in completing its road; while the mortgage was ratified by the public acts of the legislatures of four States; and while it was made the subject of protracted litigation not yet ended, though begun ten years before this bill was filed; while a new corporation has been formed by the bondholders whose organization has been ratified by public acts of the same four States, and whose stocks and other securities have been notoriously on the public market since 1875 (*p.* 219).

Galveston Railroad v. *Cowdrey*, 11 Wall. 459.

1. These acts are "public acts known to them and presumably to all the stockholders."

Field, J., in *Dimpfell* v. *O. & M. R.R.*, 110 U. S. 209, 210.
See also; *Royal Bank* v. *Grand Junction R.R.*, 125 Mass. 490, 494.

2. If the corporation knew these acts, and was silent, it is estopped.

"These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded. A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced." *Zabriskie* v. *Cleveland, etc., R.R.*, 23 How. 381, 400, 401. And see

Morgan v. *Railroad*, 96 U. S. 716, 720.
Baker v. *Humphrey*, 101 U. S. 494.

3. The Company cannot retain the benefit of having the proceeds

of $12,680,000 of the bonds expended in retiring underlying liens and in completing the road, and disaffirm the mortgage.

People's Bank v. *National Bank*, 101 U. S. 181.

4. The doctrine cannot be invoked here that a corporation is never estopped from showing a want of legal authority.

That objection was removed by the ratifying acts of 1866.

5. After the ratifying acts were passed, the only possible objection to the mortgage, (and this objection is not well founded), was want of proper action by the stockholders.

The ratifying acts, giving them their lowest possible effect, removed any objection arising from want of legislative authority.

By allowing the mortgage, reciting that proper action was taken, to be recorded, and bonds secured by it to be issued and dealt in for fourteen years, and the other acts stated above, the stockholders are estopped to make the objection that that authority was not exercised.

IV.

The stockholders could under the original charters legally hold their meetings in New York.

There is nothing in the charters of the Boston, Hartford & Erie Railroad Company, in Connecticut, Rhode Island, and Massachusetts, which prohibits the stockholders meeting outside of those States.

It is not alleged that the stockholders' meetings were not usually held in New York.

It has been said that stockholders' meetings cannot be held out side of the incorporating States.

There are two grounds on which this has been put: (1) that, as the charter is inoperative outside of the incorporating State, the faculty of acting as a corporation cannot be exercised outside of that State; (2) that a meeting outside of the State would be a surprise.

(1) In this case, the second ground is not applicable.

It may be assumed that the meetings of this corporation were always held in New York. There is no allegation to the contrary.

(2) As to the first ground, that the charter is inoperative outside of the State, and therefore the meeting is void:

That is a *non sequitur.*

If the charter expressly provided that the meetings of stockholders could be held outside of the State, a meeting so held would unquestionably be valid; yet, in that case, the charter is not operative in the State where the act was done; but the act done out of the State is operative within the State.

If the charter is silent on the point, the act may be done out of the State, and with the same legal effect as if the charter expressly authorized a meeting outside of the State.

The point is not concluded by authority:

The validity of such a meeting was assumed by Cleasby, B., in *Attorney-General* v. *Alexander*, L. R. 10 Ex. 20, 31, and is supported by the reasoning on which the validity of a Directors' meeting, held outside of the incorporating State, was supported in *McCall* v. *Bryam Manufacturing Co.*, 6 Conn. 428, 436.

The cases usually cited against the validity of such a meeting are:—

Miller v. *Ewer*, 27 Me. 509.
Freeman v. *Machias W. P. Co.*, 38 Me. 343.
Ormsby v. *Vermont Copper Co.*, 56 N. Y. 623.
Mitchell v. *Vermont Copper Co.*, 8 Jones & Sp. 406.

In *Miller* v. *Ewer*, the court held that the charter impliedly prohibited meetings outside of the State.

In *Freeman* v. *Machias W. P. Co.*, which was a suit for dividends due on four shares, in spite of a sale of the shares for nonpayment of an assessment voted outside of the State, the court held that the point was not material; as the Company was organized outside of the State, either the assessment was good or there was no company. In *Ormsby* v. *Vermont Copper Co.*, the Supreme Court held that stockholders could not hold their meetings outside of the State; but their judgment was overruled by the Court of Appeals on some ground — what ground is not stated. In *Mitchell* v. *Vermont Copper Co.*, the Supreme Court again so held, but the decision was reversed on another ground alone.

The proposition has also been stated *obiter* in cases deciding that Directors can meet outside of the State.

Arms v. *Conant*, 36 Vt. 744.
Bellows v. *Todd*, 39 Iowa, 209, 217–218.
Ohio & M. R.R. Co. v. *McPherson*, 35 Mo. 13.
Wood Hydraulic H. M. Co. v. *King*, 45 Ga. 34.

Second ground on which the mortgage is alleged to have been void: Fraud.

THE ALLEGATIONS OF THE BILL.

"And your orator is informed and believes, and therefore avers, that said meeting was held in the State of New York, beyond the States in which said corporation was created, so that as few stockholders as possible, because of the distance from their homes, might attend said meeting, in order that the stockholders present representing or acting in the interest of the Erie Railway, might, by authorizing a mortgage of its franchises, raise a large sum of money, a portion of which should afterwards be diverted to the use of said Erie Railway; which was done, as is hereinafter fully set forth, to the extent of five millions of dollars. And your orator claims that by reason of the meeting being so held for the purposes aforesaid, and in the place aforesaid, said meeting was illegal, and all its acts and doings were null and void." (*pp.* 10–11.)

The only allegation as to the subsequent connection of the Erie Railroad with these bonds is found on p. 30, and is as follows: —

"And your orator upon information and belief further avers that, on or about October in the year 1867, said Eldridge, then being the president of the Boston, Hartford & Erie Railroad, and also president of the Erie Railway, and while said Davis & Gregory were trustees as aforesaid, and said Davis being the legal counsel and adviser of said Erie Railway, said parties colluded and agreed together as such trustees and the president of said Boston, Hartford & Erie Railroad, and as well of the Erie Railway, of which the majority of said trustees were counsel and president, and sold five millions of said bonds at a discount of twenty per cent., receiving therefor the promises to pay at future dates, the exact dates of which your orator is ignorant, but which will appear upon the books of said railroads, which were afterwards discounted at great loss and cost to said Boston, Hartford & Erie Railroad, in order to convert the same into cash, and the money obtained thereon was not used in equipping and finishing said road, nor in taking up the underlying liens on said road, but was used in paying the losses that said officers of said Boston, Hartford & Erie Railroad had made in speculations in stocks in the name of said road.

"And your orator upon information and belief further avers, that said Erie Railway guaranteed the payment of the interest on the $5,000,000 of Berdell bonds, and sold and disposed of the same in

buying certain property for said Erie Railway at ninety cents on the dollar for said bonds; and that this whole transaction was made for the benefit of said Erie Railway, in accordance with a contract made between the officers of the two roads, the said officers that made and concluded said transactions and contract being substantially one and the same persons" (*p.* 30.)

I.

This is not an allegation of the commission of a fraud or of an intention to commit a fraud.

1. There is no allegation of an intention to do any act except that which was done.

The allegation as to the intention to commit a fraud, is that those acting in the interest of the Erie Railway intended by the mortgage to raise a large sum of money, which should be diverted to the Erie Railway, as was subsequently done.

2. The act committed was not a fraud.

It is not alleged that 80 per cent. was not a good price for the bonds sold to the Erie Railway. The fact that the same bonds, when indorsed by the Erie Railway, were sold at 90 per cent. is not an allegation to that effect. The indorsement of the Erie Railway may well have added 10 per cent. to the value of the bond.

3. The fact that the proceeds were used in stock gambling, carried on in the name of the Boston, Hartford & Erie Railroad Company, does not affect the title of the purchaser of the bonds. That was the fraud of the plaintiff's officers and agents, to which the Erie Railway was not a party, of which it had no notice, and of which it was the victim.

White v. *Graves*, 107 Mass. 325.
Smith's Case, L. R. 2 Ch. 604.
Sturge v. *Starr*, 2 M. & K. 195.
Wheelton v. *Hardisty*, 8 E. & B. 232.
Duranty's Case, 26 Beav. 268.

Eldridge's knowledge (if it is presumed that Eldridge had knowledge of the misapplication of the proceeds) will not be imputed to

the Erie Railway, on the ground that he was then the trustee under the Berdell mortgage and president of the Erie Railway.

(*a*) The trustee is not the agent of the bondholders.

He was appointed by the Company, and is the agent of the Company.

Commissioners v. *Thayer*, 94 U. S. 631.

(*b*) If the trustee were the agent, and the bondholders his principal, the result would be the same.

The knowledge of an agent who commits a fraud on his principal is not to be imputed to the principal.

Kennedy v. *Green*, 3 M. & K. 699.
Cave v. *Cave*, 15 Ch. D. 639.
Innerarity v. *Merchants' B'k*, 139 Mass. 332.

(*c*) As to Eldridge's knowledge as president of both companies:

It would have been a fraud on the Erie Railway to have paid for bonds with its money, knowing that the money was to be used in stock speculations in place of being used in completing and equipping the road; therefore, Eldridge's knowledge, as president of the Boston, Hartford & Erie Railroad Company, will not be imputed to the Erie Railway.

II.

This allegation goes to $5,000,000 of the bonds only: as to the remaining $15,000,000 the other allegations of the bill do not show that the defence that they were void for fraud, could have been successfully set up.

Of the remaining $15,000,000 of bonds, $7,680,000 were used in retiring underlying liens and in completing the road; $2,500,000 were issued to the Commonwealth of Massachusetts, who held as constructive trustee for the holders of an equal amount of underlying bonds; and $4,819,000 were illegally issued; but it is not alleged that they had not passed into the hands of *bona fide* purchasers for value before the decree of foreclosure.

Allegations as to the issuing of the Berdell bonds.

It is alleged that $7,404,650 were used in retiring underlying mortgage bonds. At the date of the Berdell mortgage, the outstanding underlying liens amounted

to $9,904,650 (*see p.* 7). After the Berdell bonds had been issued, they amounted to $2,500,000 (*see p.* 16).	$7,404,650.00
$4,819,000 are alleged to have been stolen by Eldridge (*see p.* 25).	4,819,000.00
$2,500,000, which by the terms of the mortgage were applicable only to retiring underlying mortgages, are alleged to have been issued for purposes other than retiring underlying mortgages (*p.* 24), and apparently were issued to the State of Massachusetts in exchange for a loan of its scrip, who took with notice of the misapplication (*see pp.* 30, 31). It is not pretended that the proceeds were not used in completing and equipping the road. The allegation is: "The proceeds of which were, by the very terms of the loan, not to be devoted to taking up the underlying liens and its mortgages" (*p.* 32, *lines* 12–14).	2,500,000.00
Apparently, the balance were used in completing and equipping the road (on *p.* 16, *line* 13, it is alleged that "a small portion of said Berdell bonds . . . have been used in completing or equipping said road"),	275,350.00
One bond was not issued,	1,000.00
	$15,000,000.00

1. *Valid bonds.*

The bonds used in retiring underlying liens ($7,404,650) and those used in completing the road ($275,350), in all $7,680,000, are confessedly valid bonds.

2. *Bonds issued to the Commonwealth of Massachusetts.*

If the bonds issued to the State of Massachusetts should have been issued to the holders of underlying liens, the State was a constructive trustee of the bonds for the benefit of the holders of those underlying liens; and, until a transfer was compelled by those holders, it was the owner of them.

3. *Bonds alleged to have been stolen by Eldridge.*

Though ordinarily there is no presumption, where a bond has been illegally issued, that the holder is a *bona fide* holder, yet, in a bill to set aside a decree for fraud in not setting up a defence, it is not enough to allege that the bond was illegally issued. It may have got into the hands of a *bona fide* holder; and it may be that

it was for that reason, that the fraud in the original issue of them, was not set up in defence.

III.

The fact that a portion of the bonds were invalid, was of no consequence in the Ellis suit, and was so treated by the court in that suit.

(*a*). If a portion of the bonds were invalid, the mortgage was a valid mortgage for the rest of the bonds.

The fact, that a portion were invalid, was of no consequence in the Ellis suit, until the Boston, Hartford & Erie Railroad Company offered to redeem. Until then, it was only important to the holders of valid bonds; for the holders of the invalid bonds were not entitled to share in the foreclosure.

There is no pretence, that the Boston, Hartford & Erie offered to redeem in the Ellis suit, or was in a position to offer to redeem. It had been insolvent for a year and two months prior to the decree of foreclosure. It was insolvent in March, 1870 (*pp.* 87–91 *and* 104). The decree of foreclosure was made May 9, 1871 (*p.* 217).

(*b*) In the agreement of facts (*p.* 165) on which "the said cause was pretended to be submitted to the said Supreme Judicial Court of Massachusetts," it is alleged: "5. That thereafterwards said corporation issued all of the twenty thousand bonds named in said mortgage except one, and that the same are now wholly or in great part owned by *bona fide* holders thereof."

In other words, the court decreed a foreclosure, when the parties agreed that to some of the bonds there was no defence, and refused to agree upon any statement of fact as to the rest.

IV.

If a fraud in issuing all the bonds known to the original bondholders were alleged in the bill, that allegation would not be an allegation of a defence to the Ellis suit, unless there was an allegation, as there was in *Pacific Railroad of Mo.* v. *Missouri Pacific R.R.*, 111 U. S. 505, that all those who were holders of the bonds at the time of the Ellis suit had notice of the fraud.

These bonds were confessedly dealt in on the market from the time of their issue in 1867; that is, for over four years before the

decree of foreclosure. While that fact is of no consequence, where the title to a particular bond illegally issued is in question, it is conclusive when, in order to make out a case, it is necessary that all the bonds should have been bought with notice. Where a single bond is in question, there is no presumption that that bond has been bought and sold on the market; it may be that the bonds sold on the market were other bonds of the same issue.

In a suit to foreclose a mortgage, no fact is a defence which would not be a defence to a suit on the bonds, for which that mortgage is security.

Carpenter v. *Longan*, 16 Wall. 271.

Third ground on which the mortgage is alleged to be void: Want of authority.

The mortgage states that the shareholders voted to authorize the Directors: —

"(1) To make application to the several legislatures of the States in which the chartered rights of this road exist for authority to make a mortgage upon the whole or any portion of the line of the road."

"(2) And to create and issue and dispose of, at the best rates that can be obtained, their convertible mortgage bonds."

The authority to issue convertible mortgage bonds implies the authority to make a mortgage.

The Directors followed the authority given them, merely changing the order of proceeding.

They first created the mortgage deed.

They then applied to the legislatures, and had it confirmed.

They then recorded it, and issued and disposed of the bonds.

Again, it is stated in the bill: —

"That said mortgage was made and authorized at a meeting of the stockholders," etc. (*p.* 10.)

Second Defence: Defence that the Breach of Condition was Fraudulently Permitted.

ALLEGATIONS OF THE BILL.

"And your orator is informed and believes, and therefore avers, that the said Hart, Clark, Lane, and others, confederates in the aforesaid conspiracy, conspiring and colluding against the interests of your orator and others, the stockholders of the Boston, Hartford & Erie Railroad, and the bondholders under said Berdell mortgage and the said Company, for the purpose of obtaining possession of said Boston, Hartford & Erie Railroad Company, and its franchises, goods, and estate, so mismanaged the affairs of said Railroad Company while officers, or acting or pretending to act as trustees under said Berdell mortgage, as to permit a default in the payment of the interest upon said Berdell mortgage bonds, so that the possession of the road, with its property, franchises, etc., could be taken and appropriated by them to their own use and gain, and that of others, their confederates." (*p.* 22.)

A. The absurdity of the allegations as to Lane is shown by the fact that he never became an officer until after the possession of the road had passed to the receivers in the Ellis suit.

B. And as to Hart and Clark, by the fact that the decree of foreclosure was made before they were appointed trustees, and was founded on defaults in three semi-annual payments of interest, the last of which, at the date of the decree, had continued for more than four months. And they never were Officers of the B H & E

The decree was made and filed May 9, 1871 (*see p.* 217); the default then existing was on the interest due Jan. 1, 1870, July 1, 1870, and Jan. 1, 1871 (*see p.* 165, *clause* 6); Hart and Clark were appointed July 10, 1871 (*see p.* 212). Any default permitted by them did not affect the foreclosure.

(*c*) It is not alleged that, had the road been well managed, it could have earned enough, not only to pay the interest as it matured, but also the eighteen months' interest then overdue.

There is an allegation in another part of the bill as to the earning capacity of the road, namely: —

"And your orator, upon information and belief, further avers that, notwithstanding the great loss, mismanagement, and wrongs done and permitted, as hereinbefore described and set forth, and the squandering and waste of the proceeds of said bonds, and the

mismanagement of the property of said road by the officers thereof, who were claiming to be trustees under said Berdell mortgage, said road, with its connections, leases, and assets, was worth more than the true and just liens and claims upon it, and from its earnings was able and capable of paying the interest upon said Berdell bonds, had their assets been devoted to the finishing and equipping of said road by said trustees and officers."

The time here in question is after mismanagement "by officers thereof, who were claiming to act as trustees under said Berdell mortgage." Eldridge is the only officer of the Boston, Hartford & Erie Railroad Company who claimed to be a trustee under the Berdell mortgage. He resigned March 16, 1870 (*see p.* 54).

It does not appear that at that time the corporation had any assets.

If it had any assets, they were not applicable to the completion of the road. In March, 1870, the first mortgage interest was nine months overdue, and the corporation was insolvent. (*So alleged in petition in bankruptcy, and not denied.*)

Third Fraud alleged in the Ellis Suit: Fraud in the conduct of the Suit.

There is a further allegation as to the Ellis suit, purporting to show that the decree of foreclosure, and the decrees recognizing the validity of the appointment of the trustees, who conveyed to the defendant corporation, were procured by fraud.

ALLEGATIONS OF THE BILL.

"And your orator is informed and believes, and therefore avers, that it was no part of the relief demanded in the said bill of complaint of the said Ellis, that the said Supreme Judicial Court of Massachusetts should decide and determine who were the trustees of the said Berdell mortgage, but that the relief therein asked for, and specifically prayed for, was a foreclosure, and none other, of the said Berdell mortgage, by sale of all the property covered thereby, and the appointment of receivers to take charge of the property *pendente lite;* but notwithstanding the failure to pray for such relief in the said bill, by collusion and preconcerted arrangement between the pretended parties to the said action, and in pursuance of a collusive and fraudulent agreement between the said Ellis and

the other parties to the said action, and the said Frederick A. Lane, respondent hereto, who was then the President of the defendant, the Boston, Hartford & Erie Railroad Company, and representing said road in said suit, the said cause was pretended to be submitted to the said Supreme Judicial Court of Massachusetts upon the said bill, answers, and a certain agreed statement of facts. That your orator is informed and believes, and therefore avers, that, in certain important and controlling particulars the said agreed statement of facts was not true, and stated certain matters as true that did not in fact exist, and omitted to state facts necessary for the proper determination of the questions submitted, which were well known to said Lane and his confederates. And that, thereupon, the said court, on the twenty-fourth day of April, 1871, without argument on the part of any of the parties to the said action, and by the consent of all the parties thereto, and being imposed upon in manner aforesaid, and to the great damage of your orator and other stockholders of the Boston, Hartford & Erie Railroad Company, made a decretal order, by which the said respondents, Kimball, Talbot and Plumer, were declared to be, and apparently adjudged to be, the lawful trustees under the Berdell mortgage, and that the said trustees should have the right, power, and authority to take possession of all the property of the said Boston, Hartford & Erie Railroad Company, upon paying certain sums, and making certain arrangements with the said receivers, who, by a former order, had been appointed in the said Ellis suit.

"That, thereafterwards, and without permission thereto of any court having competent jurisdiction, and without notice to said Berdell bondholders, the confederates aforesaid, or some of them, in furtherance of said conspiracy, procured, or caused to be procured, the pretended resignations of said Talbot, Kimball and Plumer, and the pretended appointment by them of the said respondents, Hart and Clark, and of said Olyphant, since deceased, as aforesaid." (*pp.* 19–20.)

I.

The copy of the Ellis bill, annexed to the bill in this case, shows, that a determination as to who were the trustees under the Berdell mortgage, was part of the relief prayed for in that bill.

In that bill, precisely the same contention was made as is made here, and on the same grounds (*compare the first whole paragraph on*

page 14 *with the last whole paragraph on page* 119; *and see clause* 12 *of the Agreement of Facts, pp.* 167, 168); namely, that all the resignations by and appointments of trustees under the Berdell mortgage were void, because not acted on by the bondholders, or a court of competent jurisdiction. The bill prayed for a foreclosure and for general relief.

The court could not decree a foreclosure without determining who were the trustees under the mortgage.

II.

1. The general allegation that, "in certain important and controlling particulars, the said agreement of facts was not true, and stated certain matters as true that did not in fact exist, and omitted to state facts necessary for the proper determination of the questions submitted, which were well known to Lane and his confederates," without pointing out what facts alleged were untrue or did not exist, or what necessary facts were omitted, is bad for uncertainty.

United States v. *Atherton*, 102 U. S. 372.
Van Weel v. *Winston*, 115 U. S. 228.
Hazard v. *Griswold*, 21 Fed. R. 178.
Ambler v. *Choteau*, 107 U. S. 586.
Wallingford v. *Mutual Society*, 5 App. Cas. 685.

2. The allegation is shown to be untrue by the record annexed. If the facts set forth in the "Agreement of Facts" (p. 165) are compared with those alleged in this bill, it will be found that they are in substance the same.

That on demurrer it is open to the defendant to contradict an allegation in the bill by the contents of a record annexed to it; see

Dillon v. *Barnard*, 21 Wall. 430.

III.

On the facts alleged in the bill, Talbot and Kimball were the legally constituted trustees.

Ellis v. *Boston, Hartford & Erie R.R. Co.*, 107 Mass. 1.

SUMMARY AS TO THE ALLEGED FRAUD IN ELLIS SUIT:

It is apparent that the Ellis suit, whatever fraud may have been intended by those who instituted it, was prosecuted by *bona fide* bondholders, who were evidently admitted as co-plaintiffs that the suit might be properly conducted, and by whom it appears that it was properly conducted, to a foreclosure of the mortgage, to which there was no defence, for the benefit of the bondholders, who are now in possession of the property.

FOURTH POINT.

If there was originally a right to attack the Ellis decrees for fraud, that right has been lost by *laches*.

I.

It is clear that the Boston, Hartford & Erie Railroad Company could not maintain this bill: the corporation is clearly barred by *laches*.

1. That *laches* can be taken advantage of on demurrer see:

Landsdale v. *Smith*, 106 U. S. 391.
Dimpfell v. *Ohio & Miss. R.R.*, 110 U. S. 209.

2. That a plaintiff may be barred by *laches*, though the statutory period has not run, is also clear.

Sullivan v. *Portland R.R.*, 94 U. S. 806, 811.
Brown v. *Buena Vista*, 95 U. S. 157.
Hayward v. *National B'k*, 96 U. S. 611, 617.
Dimpfell v. *Ohio & Miss. R.R.*, 110 U. S. 209.

3. The decree for foreclosure was made nine years and two months, the foreclosure was perfected six years and four months, and the railroad was conveyed to the defendant corporation — the New York & New England Railroad Company — five years and one month before this bill was filed. During this time, not only were the $20,000,000 of Berdell bonds, and afterwards the $20,000,000 of New York & New England stock, into which they were converted, dealt in on the market, but $10,000,000 of bonds of the new corporation were also issued and dealt in. (*See statutes authorizing a first mortgage and a second mortgage:* Mass. Sts. 1873, *c.* 289, § 4,

Brief, p. 70; 1882, *c.* 240, *Brief, p.* 70; Conn. Sts. 1873, § 4, *Brief, p.* 74; 1882, § 2, *Brief, p.* 75; R. I. Sts. 1873, § 4, *Brief, p.* 78; 1882, § 1, *Brief, p.* 79; N. Y. St. 1873, *c.* 550, § 3, *Brief, p.* 82; the New York & New England Railroad Company *would hardly have applied for leave to issue a second mortgage, if all the bonds under the first had not been issued.*)

And yet, during all this time, the Boston, Hartford & Erie Railroad corporation never suggested that the decree of foreclosure was obtained by fraud.

The bill is clearly within the decided cases: —

Dimpfell v. *Ohio & M. R.R.*, 110 U. S. 209.
Sullivan v. *Portland R.R.*, 94 U. S. 806.
Brown v. *Buena Vista*, 95 U. S. 157.
Twin Liek Co. v. *Marbury*, 91 U. S. 587.
Peabody v. *Flint*, 6 Allen, 52.
Royal Bank v. *Grand Junction Railroad*, 125 Mass. 490, 494.
Boston & P. R.R. v. *N. E. R.R.*, 13 R. I. 260.

"Every day's delay increased the complication and the difficulty of making an equitable adjustment of them. In the mean time, the stock in the corporations must have been frequently changing hands, and there are no means of adjusting the equities growing out of such changes. A similar remark is applicable to the holders of the bonds secured by the mortgage. The nature of the case required the utmost diligence, in order to prevent injustice. Yet the plaintiffs delayed more than three years and a half after the making of the mortgage and until after they had sought aid from the legislature." Chapman, J., in *Peabody* v. *Flint*, 6 Allen, 52, 57.

4. A bill to set aside a decree for fraud, being a proceeding in the nature of a review, ought, in analogy to writs of review, to be barred after the expiration of a year succeeding the discovery of the fraud.

Evans v. *Bacon*, 99 Mass. 213.

5. No excuse is alleged for not bringing the bill sooner.

(*a*) "The party who makes such appeal [to enforce a stale demand] should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill. Otherwise,

the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer." Grier, J., in *Badger* v. *Badger*, 2 Wall. 87, 95; and see

Marsh v. *Whitmore*, 21 Wall. 178, 185.
Godden v. *Kimmell*, 99 U. S. 201, 212.

(*b*) "In such cases [*i.e.*, of *laches*], it is not merely a question as to what information respecting their rights parties do actually obtain, but as to what information they might have obtained, had they used the means and opportunities directly at their command." Bradley, J., in *Hoyt* v. *Sprague*, 103 U. S. 613, 637; and see

Badger v. *Badger*, 2 Wall. 87, 95.

II.

The objection of *laches* cannot be avoided by bringing the bill in the name of a stockholder, who has been under disability.

A.

The *laches* in question is the *laches* of the body of stockholders, not of the individual in whose name the suit is brought.

In re Cape Breton Co., 29 Ch. Div. 795, 798.
Erlanger v. *New Sombrero Co.*, 3 App. Cas. 1218, 1232, 1263, 1280.
Brinckerhoff v. *Bostwick*, 99 N. Y. 185, 193.

See also:

Merchants' B'k v. *Stevenson*, 7 Allen, 489, 494.

Though in the name of one stockholder, the bill is the bill of the body of stockholders, to enforce their rights as a corporation.

It is the "corporation whose interests are alone affected directly, whose rights are to be vindicated, and to whose use exclusively the judgment, if recovered, must enure." Wells, J., in *Brewer* v. *Boston Theatre*, 104 Mass. 378, 386.

It is preposterous that stockholders holding 99,900 shares, whose right to a judgment as a body is barred by *laches*, should be enabled to obtain that judgment by finding a stockholder holding one hundred shares, who has not been guilty of *laches*, and bringing a representative suit for the benefit of the body in the name of that stockholder.

When a suit is brought in the name of one stockholder in

behalf of all, to enforce rights which ought properly to be enforced in the name of the corporation, justice requires that the court should look beyond the form to the substance of the action; and, if the body to whom the rights belong have lost those rights by *laches*, they cannot avoid that objection, because, by an exception to a rule of pleading, added to an exception in the rules as to parties to actions, they are allowed to sue in the name of one who has been under a personal disability.

B.

If the defence of *laches* is to depend on the acquiescence of the individuals in whose name the suit is brought, this bill is not free from *laches*.

1. In that case, the *laches* in question is the *laches* of Graham, not of Raymond.

As the intervention of stockholders does not destroy federal jurisdiction depending on citizenship, but the suit, if originally well brought, continues so (*Stewart* v. *Durham*, 115 U. S. 61), so the intervention of stockholders cannot cure the defect of *laches;* and, if originally not well brought, it continues so.

Either Graham or his predecessor in title was confessedly guilty of *laches*. If the right to set aside this decree, made before Graham owned the shares, came to Graham with the shares, it came subject to the *laches* of the prior owner.

2. The objection of *laches* is not removed by the intervention of Maria Teresa Raymond, who acquired her shares by gift a year and one-half after the decree of foreclosure, and did not come of age until eight years after, that is more than a year after this bill was brought.

The fact that the owner of shares is under a disability is of no consequence. The owner's guardian, the representative of the shares for the time being, was guilty of *laches*. The objection of *laches* is not the objection of the Statute of Limitations, and, in enforcing it, equity does not act in analogy to the statute. In respect to *laches*, there is no such thing as a disability.

If disabilities do obtain in *laches*, in case of *laches*, as in case of the Statute of Limitations, disability is no excuse, unless it existed when the cause of action accrued; *i.e.*, if time has once begun to

run, a disability, subsequently accruing, does not prevent its continuing to run.

Raymond is only one of three representative plaintiffs. If she is not guilty of *laches* and the other two are, are two-thirds of the class represented by them barred and one-third not?

THIRD DIVISION.

TITLE BY FORECLOSURE IN PAIS.

FIRST POINT.

The mortgage is a valid mortgage for at least a portion of the bonds secured by it, and of that mortgage a good foreclosure has been made *in pais*.

I.

The mortgage is a valid mortgage.

A.

The mortgage is not void because the stockholders' meeting was held in New York.

1. The Boston, Hartford & Erie Railroad Company was a New York corporation. See *supra, pp.* 25–26.

2. The "proceedings" whereby the mortgage was made, as well as the mortgage, were ratified by the legislatures of the States by which the corporation was chartered.

The fact that the meeting was held in New York is recited on the face of the mortgage, was therefore known to the legislatures and ratified as part of the proceedings. The ratification was made before the bonds were issued or the mortgage deed recorded, and therefore is as effectual as an original authority, and will be presumed to have been obtained upon the application of the corporation. See *supra, pp.* 26–29.

3. The corporation are estopped to say that the Boston, Hartford & Erie Railroad Company is not a New York corporation, and the meeting in New York a valid meeting.

The corporation has remained silent for fourteen years, while $20,000,000 of bonds purporting to be secured by this mortgage as a valid mortgage have been dealt in on the market, while a new corporation has been organized by the bondholders, and the stock

and mortgage bonds of that corporation have been put upon the market; during all this time, the corporation never questioned the validity of the original mortgage. See *supra, pp.* 29–31.

4. A meeting of stockholders can rightfully be held outside of the States chartering the corporation. See *supra, pp.* 31–32.

B.

The mortgage is not void for fraud.

The mortgage is unquestionably a good mortgage for the $7,404,650 of bonds used in retiring underlying liens and for the $275,000 used in completing the railroad and for the $5,000,000 sold to the Erie Railway, and for the $2,530,000 issued to the State of Massachusetts and used for completing the road. See *supra, pp.* 34–38.

II.

Of this mortgage, a valid foreclosure has been made *in pais.*

A.

The entry for foreclosure was made "in accordance with the terms of said indenture of mortgage, . . . pursuant to . . . all and every other power and authority them thereto enabling" (*p.* 52).

It is admitted that by the terms of said mortgage the foreclosure became perfect (*p.* 33), and it is not pretended that the default alleged in the Ellis suit does not still continue.

That the foreclosure became legally complete by the continuance of the default for eighteen months after entry is clear.

By confirming the mortgage which contained a provision to that effect (*p.* 48, *clause* 9), the legislatures of the four States enacted, as a part of the statutory law of their respective States, that the time for the redemption of this mortgage should be limited to eighteen months after entry and certificate filed, and that a foreclosure of the right of redemption could be effected by entry and filing of the certificate and a continuance of the default for eighteen months.

B.

Objections to the foreclosure.

(1) It is objected that the persons who entered and filed the certificates were not the trustees under the mortgage.

(*a*) That the persons who entered were the trustees by valid appointment, see:

Ellis v. *Boston, Hartford & Erie R.R. Co.*, 107 Mass. 1, and cases there cited.

(*b*) The legality of their appointment has been ratified by the legislatures of the four States, by the Acts which confirmed the organization of the New York & New England Railroad Company, and declared that upon those trustees conveying the property to the corporation all the rights, powers, and franchises of the Boston, Hartford & Erie Railroad Company should vest in the New York & New England Railroad Company.

Mass. St. 1873, *c.* 289. *Brief, p.* 69.
Conn. St. 1873, May 29. *Brief, p.* 73.
R. & St. 1873, May Session. *Brief, p.* 78.
N. Y. St. 1873, *c.* 550. *Brief, p.* 81.

(2) It is objected that the bonds have never become due, and therefore the foreclosure is void (*p.* 36).

Default in the payment of the interest was, by the terms of the mortgage, a breach of the condition thereof, for which it might be foreclosed, as it was foreclosed (*p.* 47, *clause* 7).

That there was a default in the interest when the entry was made is admitted (*a default in interest is alleged in the Ellis bill, and not denied*).

A foreclosure for default in interest is a good foreclosure, though the principal is not due.

C.

Objections to the organization of the New York & New England Railroad Company.

1. If the organization of the New York & New England Railroad Company were void, these plaintiffs can make no claim founded on that fact.

The effect of such invalidity would be that the title to the property they seek to obtain would be in the trustees for all the bondholders, instead of being in the new corporation, for those bondholders who had converted their bonds into stock.

2. On the facts alleged, the organization is valid.

(*a*) It is claimed that the provision in the mortgage (*p.* 49, *clause* 10), where the bondholders are authorized to organize as a corporation, is void (*p.* 29).

The legislatures could, and did, grant a charter to the bondholders as effectually by confirming the mortgage containing this provision, as they would have done by a separate enactment.

Howe v. *Freeman*, 14 Gray, 566.

Independently of these statutes, the provision was valid and effectual as an agreement that the bondholders, after the foreclosure, should organize themselves into a corporation, and that the trustees should then convey the property to the corporation. The agreement would be perfectly valid, even if it were necessary to obtain legislative authority to carry it into effect.

(*b*) The bill alleges that the notice of the bondholders' meeting "was not advertised for a sufficient time to allow the bondholders, and especially those in London in England, to attend," etc. (*p.* 35).

The mortgage (*p.* 40) provides what advertisement of the notice there should be; namely, three times a week for three successive weeks. If that notice was not sufficient for some bondholders, it was a defect in their security, but does not affect the sufficiency of the notice.

It is not alleged that there were any bondholders in London.

(*c*) The bill alleges as another objection to the organization of the New York and New England corporation that the Commonwealth of Massachusetts took part in the meeting as holder of the $4,000,000 of bonds (*p.* 32).

It is alleged that $2,500,000 only, of the $4,000,000 of bonds held by the Commonwealth should have been reserved for the holders of underlying liens. The Commonwealth, as holder of the $1,500,000, confessedly had the right to take part in the organization.

As to the $2,500,000, the effect of the Commonwealth taking them with notice is that it could have been charged by the holders of the underlying bonds as a constructive trustee of them for their benefit. Until that was done, the Commonwealth was the owner of them.

If these bonds were void, it is no objection, unless the votes cast upon them changed the majority. *Non constat* but that all the votes cast were one way.

First Parish v. *Stearns*, 21 Pick. 148, at 154.

(*d*) It is also alleged as an objection to this meeting that some of the bonds stolen by Eldridge, some sold to the Erie Railway, and some of the bonds which had come into the hands of the trustees by redemption, and some bought by the trustees, were represented there (*p.* 35).

The bonds bought by the trustees and those sold to the Erie Railway were confessedly valid.

It is not pretended that Eldridge was, at this time, the holder of the bonds stolen by him; the plaintiff, in framing his allegation in this respect, has carefully avoided making that statement.

If the bonds which came into their hands by redemption could not have been properly voted on, it is not material, since it is not alleged that they changed the majority; see *supra* (*c*).

3. The organization of the New York & New England Railroad Company has been confirmed by statute in all four States.

Mass. St. 1873, *c.* 289. *Brief, p.* 69.
Conn. St. 1873, May 29. *Brief, p.* 73.
R. I. St. 1873, May Session. *Brief, p.* 78.
N. Y. St. 1873, *c.* 550. *Brief, p.* 81.

SECOND POINT.

If the foreclosure is invalid, the right to complain of it has been lost by *laches*.

I.

For a discussion of the doctrine of *laches*, and the proposition that the *laches* in question is the *laches* of the body of stockholders and not of Maria T. Raymond, see *supra pp.* 43–47.

II.

That the right to avoid the foreclosure is lost within the cases cited *supra p.* 44 is clear.

This bill was filed seven years and three months after the foreclosure became perfect and eight years and nine months after the entry to foreclose was made and possession taken.

Meanwhile, not only have the stock and bonds of this corporation been dealt in on the market, but a new corporation has been formed, and its stock and bonds have also been put on the market.

FOURTH DIVISION.

TITLE BY RELEASE OF THE EQUITY OF REDEMPTION FROM THE ASSIGNEES IN BANKRUPTCY.

This title goes to the whole bill.

The mortgage is a valid mortgage, even if a portion of the bonds issued under it are invalid.

The right of redeeming the mortgage passed to the assignees in bankruptcy, and was by them released to the New York & New England Railroad Company.

After this had been pointed out by demurrer (*pp.* 59–63), an attempt was made to get rid of it by an amendment to the bill, setting up that the bankruptcy proceedings which were alleged in the original bill to have been duly brought and prosecuted to an adjudication, election of assignees and assignment, were void for fraud. But, though the bill was sworn to, the plaintiff did not dare to swear to the amendment.

FIRST POINT.

WRONG FORUM.

I.

The plaintiffs are parties to the bankruptcy proceedings, and bound by them equally with the corporation.

Sanger v. *Upton*, 91 U. S. 56.

See *supra*, Second Division, First Point, II., *pp.* 18–19.

II.

If the plaintiffs wish to attack the proceedings for fraud, their remedy is to bring a supervisory petition to the Circuit Court under Rev. Sts., § 4986, and have the adjudication and assignment vacated.

So long as they have that remedy, they cannot maintain a bill to deprive these defendants of the property held under the decree, and so attack the bankruptcy decrees collaterally.

See *supra*, Second Division, Second Point, I., *pp.* 20–21.

SECOND POINT.

No fraud is alleged which will render the bankruptcy proceedings void.

It is admitted that the corporation was insolvent, and had committed acts of bankruptcy (*it is so alleged in Adams' Petition, pp.* 87–91 *and* 104, *and not denied in this bill*). It must be assumed (because there is no allegation to the contrary) that the election of the assignees was by the votes of honest creditors (that there were honest creditors is clear; the Company had been insolvent for six months). It is admitted that the assignees were honest; (no suggestion is made that they were parties to any fraud or conspiracy). It is admitted that the debt on which the involuntary petition was founded was a valid debt.

The supposed fraud is alleged to consist in this:—

That Lane, not Adams, was the owner of the coupons which constituted the petitioning creditor's debt, and that he caused the petition to be brought in the interest of the Erie Railway as part of the same scheme, as that of which the Ellis suit was a part; and that Lane, being instructed by the Directors to oppose the petition, employed counsel to consent to an adjudication under it.

I.

So far as the alleged fraud in bringing the petition is concerned, it lies in Lane's ulterior motive alone.

If Lane was the owner of the coupons, he had a right to make Adams the holder, that he might bring the petition for Lane's benefit.

Law v. *Parnell*, 7 C. B. (N. S.) 282.
Ancona v. *Marks*, 7 H. & N. 686.
Wheeler v. *Johnson*, 97 Mass. 39.

Although the averment is made that "Adams was not a creditor in fact," the subsequent part of the same sentence shows that this is a conclusion of law and what the fact was; *p.* 74.

II.

So also is the allegation that "said bankruptcy proceeding was a voluntary proceeding on the part of said corporation as represented by the attorney of said Lane, which said proceeding was wholly

without law and without authority," is a conclusion of law (*Alabama* v. *Burr*, 115 U. S. 413, 426). The facts alleged show that it was brought by Lane personally and resisted in good faith by the Directors of the Company.

III.

Lane's motive in bringing the petition is to-day entirely immaterial.

A.

The motive has been frustrated.

The Erie Railway never got control of the Boston, Hartford & Erie Railroad as a feeder or otherwise.

B.

But the decisive answer is, that bankruptcy proceedings are not causes *inter partes*, but proceedings *in rem*, in which all creditors are interested.

If the motive of Lane had been made to appear in defence of the petition, the honest creditors could have intervened and prosecuted the involuntary petition; and, if they had done so, the objection, that it was begun with an ulterior motive, would have been eliminated. *Non constat* that other creditors did not so intervene, the record of the bankruptcy proceedings annexed to the bill is only made up of such parts as the plaintiff chose to select.

It is preposterous to contend that, because a petition in involuntary bankruptcy was begun with an ulterior motive, the adjudication and assignment founded thereon will be set aside, when it is admitted that the motive was never carried into effect, the debt on which the petition was founded was a good debt, the debtor was a debtor within the Bankruptcy Act (*Sweatt* v. *Boston, Hartford & Erie R.R. Co.*, 3 Cliff. 339), was in fact insolvent and had committed acts of bankruptcy, the assignees were elected by honest creditors and are honest assignees.

(1) That an involuntary petition in bankruptcy is a suit in behalf of all creditors has been repeatedly held: —

"At first view, it is natural and agreeable to our ordinary ideas upon the subject to assume that a petition by an alleged creditor against his debtor to compel submission of his estate to the bankrupt court, is a contest between two parties, with which a third person may not meddle. But this is by no means a complete view

of the scope and effect of the proceeding. It is not a mere suit *inter partes:* it rather partakes of the nature of a proceeding *in rem*, in which every actual creditor has a direct interest." Woodruff, J., in *In re Boston, Hartford & Erie R.R. Co.*, 6 N. B. R. 209, 213, 214; see also:

In re Lacey Downs & Co., 10 N. B. R. 477.
In re Sheehan, 8 N. B. R. 345, 349.

(2) This court will not hold the proceedings void when attacked collaterally, if the Circuit Court would have to affirm them when attacked directly.

If a supervisory petition were now brought directly to vacate the adjudication, the whole cause would be open in the supervisory court as a court of equity; (Rev. Sts., § 4986); *Oldham* v. *Stonehouse*, 3 M. & C. 317; *Consequa* v. *Fanning*, 3 Johns Ch. (N. Y.) 587, 594–595; and the court would have to affirm the adjudication, because no defence is shown to it.

It would appear that no injury had resulted from the objectionable motive, and the adjudication would not be set aside.

Allis v. *Insurance Co.*, 97 U. S. 144.
Mining Co. v. *Taylor*, 100 U. S. 37.
Cannon v. *Pratt*, 99 U. S. 619.
Philpot v. *Gunninger*, 14 Wall. 570.

IV.

It appears from the allegations of the bill that the petition was honestly defended.

Judge B. R. Curtis was in fact employed by Lane to defend, and did defend, the petition. He chose, as the only ground of defence, the want of jurisdiction over a railroad corporation, and filed a motion to dismiss on that ground. On that motion, the Bankruptcy Court decided against him; and he took an appeal to the Circuit Court by a petition to its supervisory power. That petition was withdrawn by him on the 28th of February; and a similar petition was brought by one Sweatt, a creditor and stockholder of the Company, on March 18 (*pp.* 95–99). No suggestion is made against the honesty of Judge Curtis or Mr. Sweatt in the conduct of this defence. If the ground on which they elected to rest the defence was not the right one, it was through mistake, not fraud.

There was no mistake, there was no other ground on which the petition could have been defended.

1. The fact that Adams was furnished with the coupons by Lane has already been dealt with.

If Sweatt had known of this and of the ulterior motive of Lane, and decided that it was useless to take the point, as it could be cured by the intervention of other creditors, is the failure to take the point ground for vacating the assignment?

2. It is settled that a secured debt will support an involuntary petition in the First Circuit.

In re Alexander, 1 Lowell, 470.

That the debt could not be proved except upon contingencies that could not then happen, and did never happen, is a conclusion of law, and the facts alleged in the bill are not sufficient to support them.

Alabama v. *Burr*, 115 U. S., at p. 426.

3. It is not necessary that the debt on which the involuntary petition is brought should be paper issued by a banker, broker, etc.

If an act of bankruptcy is committed, any creditor who had a debt for $250 could at that time bring a petition for involuntary bankruptcy.

Rev. Sts., §§ 5021, 5023.

The non-payment of Adams' debt was not relied on as an act of bankruptcy. The acts of bankruptcy relied on were suffering the corporate property to be attached, with intent to give a preference, and other acts (*pp.* 87–91 *and* 104).

4. It is also alleged that the adjudication was made on an unauthorized consent.

That can be no ground for vacating the adjudication, when the debtor has now no defence to interpose.

THIRD POINT.

If it is contended that, though the assignment in bankruptcy is valid, this corporation cannot set up the title derived from the

assignees under it, because the proceedings were fraudulently instituted to procure that title, and, though the fraud was not wholly carried out, it did result in procuring the title, the answer is clear.

The right to bring this bill, if the assignment is valid, passed to the assignees, and now belongs to them as the representatives of the general creditors.

If the mortgage is void, or there is value in the equity of redeeming it, which is not foreclosed, the equity of redemption, or the property freed of the burden of the mortgage, belongs to the creditors, not to the corporation.

United States v. *Union Pacific R.R.*, 98 U. S. 569.

FOURTH POINT.

The adjudication in bankruptcy is voidable, not void; and it is now too late to avoid it.

I.

If the adjudication in bankruptcy was procured by fraud, it is voidable, and not void. And, after the rights of third parties have intervened, it is too late to avoid it.

"The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and, therefore, all acts performed under them are valid, so far as respects third persons. A sheriff who levies an execution under a judgment fraudulently obtained is not a trespasser, nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same, in one obtained by fraud, as if it had been obtained fairly." (By Marshall, C. J., in *Simms* v. *Slacum*, 3 Cranch, at *pp.* 306, 307.) See also:

STORY, J., in *Whiting* v. *Bank of U. S.*, 13 Pet. 6, 15.

II.

In the case at bar, before any attempt was made to avoid the title of the assignees in bankruptcy, the assignees had conveyed their title to the Berdell bondholders; and it is not pretended that they were parties to the fraud.

More than that, these bonds were sold on the market, the property was conveyed to a new corporation, and its stock was sold on the market for more than five years before the attempt was made to avoid the bankruptcy title.

FIFTH POINT.

If there ever was a right to avoid the title derived from the assignees in bankruptcy, that right has been lost by *laches*.

I.

For a discussion of the doctrine of *laches*, and the proposition that the *laches* in question is the *laches* of the corporation and the body of the stockholders, and not of Maria T. Raymond, see *supra*, *pp.* 43–47.

II.

That the right to avoid the assignment in bankruptcy is lost within the cases cited *supra*, *p.* 44, is clear.

This bill was filed nine years and nine months after the petition in bankruptcy was filed, nine years and four months after the adjudication was made, and over seven years after the release of the equity by the assignees. (*The date of the release is not stated. It is stated to have been "after the time when, by said terms of said mortgage, the foreclosure had become perfect." That was on March* 18, 1873.)

Meanwhile, not only have the stock and bonds of this corporation been dealt in on the market, but the rights of the general creditors have become barred by the statute; and their debts are gone, except for the purposes of proof in bankruptcy.

III.

An attempt has been made to avoid the objection of *laches* by a general allegation "that all notice or knowledge of said proceedings was wholly concealed from him [Graham] and from said stockholders of said corporation and said Board of Directors, except that they were told by their said president that there had been a legal adjudication against them in bankruptcy in the proper court of the United States, to which they were bound and obliged to submit, and to which they did submit; and that knowledge of the facts herein set forth has — come to your orator, or to any other of the stockholders of said Company, as your orator is informed and

believes, and therefore avers, until the time that an examination in his behalf of what proceedings had been had was made as part of the prosecution of this suit" (*pp.* 75, 76).

"It is true that there is a general allegation that the 'fraudulent acts were unknown to the complainants until within five years past'; while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill." Grier, J., in *Badger* v. *Badger*, 2 Wall. 87, 95.

So, in this case, the fact that Judge Curtis withdrew his appeal, and Mr. Abbott consented to an act of bankruptcy, supplemented by the fact that the Directors voted to oppose the bankruptcy proceedings, were on records and books open to Graham's inspection.

And it appears that these facts were in fact known to one stockholder, Sweatt, at the time.

FIFTH DIVISION.

OTHER DEFECTS IN THE BILL.

So far as the bill seeks to set aside the foreclosure, the bill cannot be maintained, because it is not a bill to redeem.

So far as the bill seeks to set aside the mortgage as wholly void, it cannot be maintained, because the plaintiffs are a minority, and the majority of the stockholders can now ratify the mortgage.

These two points together cover the whole bill.

I.

As a bill to enforce the trusts of the mortgage, for the appointment of new trustees under the mortgage, and a conveyance of the mortgage title to them, the bill cannot be maintained.

"For I take it to be settled, that the owner of the equity of redemption cannot make a mortgagee a party to any suit in this court, without offering to redeem him." Ld. Langdale, M.R., in *Dalton* v. *Hayter*, 7 Beav. 313, 319.

"The mortgagor has in equity a right to redeem the estate on paying to the mortgagee the principal and interest due to him; and for that purpose, but for that purpose only, to draw the mortgagee into litigation. For all other purposes, he has parted with

his whole estate to the mortgagee; and he has no right to call in question the mode in which he may be dealing with that of which, except as to the liability to be redeemed, he is, as between himself and the mortgagor, the absolute owner." Ld. Cranworth, Ch., in *Jefferys* v. *Dickson*, L. R. 1 Ch. 183, 188, 189.

This is unquestionably law in England.

Inman v. *Wearing*, 3 De G. & Sm. 729.
Tasker v. *Small*, 3 M. & Cr. 63, 69.
Ld. Selborne, Ch., *Jervis* v. *Berridge*, L. R. 8 Ch. 351, 358.

To same effect, see:

Beekman v. *Frost*, 18 Johns. 544.
Goldsmith v. *Osborne*, 1 Edw. Ch. 560.
Hoopes v. *Bailey*, 28 Miss. 328.
Perry v. *Carr*, 41 N. H. 371.
Kemp v. *Mitchell*, 36 Ind. 249.
Coombs v. *Carr*, 55 Ind. 303.
Turner v. *Williams*, 63 Ga. 726.

That the objection is open on demurrer, see:

Tasker v. *Small*, *ubi supra*.
Inman v. *Wearing*, *ubi supra*.
1 Fisher's Law of Mortgage (4th ed.), *p.* 824.

II.

A. It is clear that the allegations of fraud, putting them at their highest, only go to a portion of the bonds. The mortgage, therefore, as a whole, cannot be set aside except on the ground that the stockholders met in New York.

B. The stockholders can hold a legal meeting to-day and confirm this mortgage.

After the Acts ratifying it, it cannot be pretended that there is any objection on the ground that there is no legal authority for the mortgage.

C. If the stockholders can conform the mortgage, this bill, being by a minority of stockholders, cannot be maintained to set it aside.

Hawes v. *Oakland*, 104 U. S. 450, 461, 462.
Samuel v. *Holladay*, Woolw. 417, 420.
Wigram, V.C., in *Foss* v. *Harbottle*, 2 Hare, 461, 494.
Mellish, L.J., in *McDougall* v. *Gardiner*, 1 Ch. D. 13, 25, 26.
See supra, FIRST, II.

SIXTH DIVISION.

ALLEGATIONS WHICH CANNOT BY ANY POSSIBILITY BE TRUE OR ARE INCONSISTENT WITH OTHER FACTS IN THE RECORD.

So far, the allegations of the bill have been treated as seriously made, the highest effect has been given to them, and they have been treated as fully admitted.

But many cannot by any possibility be true, and those are not admitted on demurrer; and many more are inconsistent with other parts of the record.

How far these considerations are open on demurrer has been well stated by V. C. Wigram, in *Foss* v. *Harbottle*, 2 Hare, 461, 503, 504:—

"I must further observe that, although the bill does with great caution attempt to meet every case which it was supposed might have been fatal to it on demurrer, yet it is by allegations of the most general kind, and many of which cannot by any possibility be true. It alleges the recent discovery of the acts complained of, but it gives no allegation whatsoever for the purpose of telling when or how such discovery was made or what led to it. I am bound to give the plaintiff, on a general demurrer, the benefit of the allegation that the matters complained of have been recently discovered, — whatever the term 'recently discovered' may mean,— but, when I look into the schedule to the act, I find that many of those matters must have been known at a very early period in the history of the company. I find, also, provisions of the act requiring that books shall be kept in which all transactions shall be fully and fairly stated; and I do not find in the bill anything like a precise allegation that the production of those books would not have given the information, or that there have not been means of seeing those books at least some time since 1835, or since the transactions in question took place, so that, in point of fact, many of the transactions might and may have been sooner known. These are observations upon which I do not found my judgment, but which I use as explaining why it is I have felt bound in favor of the defendants to construe the bill with strictness."

I.

Allegations as to the Ellis suit inconsistent or not possibly true.

1. The bill alleges "that, notwithstanding the joining of other persons with the said George Ellis as parties plaintiff, the said action was, in fact, conducted by the said Ellis acting for Frederick A. Lane, . . . and in accordance with his views and purposes; and that said parties plaintiff to the said suit permitted themselves to be controlled and directed in the management thereof by the said Ellis, acting in the manner aforesaid" (*p.* 18).

The only ground, on which Ayer and the Commonwealth of Massachusetts could have been admitted as co-plaintiffs, must have been that it was necessary to prevent Ellis conducting the suit in fraud of the bondholders. Had the plaintiffs in this bill included, in the so-called record of the Ellis suit, the petition of Ayer and the Commonwealth for leave to intervene as co-plaintiffs, it would have appeared that that was the ground on which they were admitted. And, from the report of this case in 107 Mass. 1, 10, it appears that these plaintiffs were not admitted as matter of form, but after notice and hearing.

That, after the intervention of these plaintiffs, the suit was, in fact, conducted for the benefit of the bondholders, is incontestably shown by the fact that to-day the bondholders are in possession of the property.

2. Again the bill alleges that, "by collusion and preconcerted arrangement between the pretended parties to the said action, . . . the said cause was pretended to be submitted . . . upon the said bill, answer, and a certain agreed statement of facts; that, . . . in certain and important and controlling particulars, the said agreed statement of facts was not true, and stated certain matters as true that did not, in fact, exist, etc.; . . . and that, thereupon, the said court, . . . without argument on the part of any of the parties thereto, and being imposed upon in the manner aforesaid, . . . made a decretal order by which the said respondents, Kimball, Talbot, and Plumer, were declared to be" trustees (*pp.* 19, 20).

(*a*) Reference to the published reports of the case shows that the case was reserved for the consideration of the full bench, and decided by them in a careful opinion, after argument by able counsel representing all the several parties to the suit (*it is to be noted that, though J. G. Abbott only is stated in the report of the case to have been counsel for the trustees, he signed the Agreement of Facts as counsel for the Company*).

Ellis v. *Boston, Hartford & Erie Railroad Co.*, 107 Mass. 1, 10–14.

(*b*) The Agreement of Facts not only states the facts to be substantially as they are stated in the bill, but there is no fact in it contradicted by this bill; and, in the agreement, the complainants expressly made the same claim that is made here,—namely, that Talbot, Kimball and Plumer were not legally the trustees, and on the same ground as that on which it is here made (*see clause* 12, *p.* 167).

(*c*) The absurdity of this fraud on the court being hidden from the parties in the Ellis suit, and discovered ten years after that sharply contested case was begun, by a stockholder who never left his native town of Inniskillen, Ireland, is shown by the fact that he cannot state when he discovered it, how he discovered it, or what it was when discovered.

And this is as true of the whole case set forth in the bill here in question, as of this particular fraud in the Ellis suit.

3. The bill alleges that Hart, Clark and Lane, through mismanagement of the road, fraudulently permitted a default in the payment of the interest due on the Berdell mortgage.

It has been pointed out already that the default, for which the mortgage was foreclosed, had taken place and the decree been made by the court before Hart and Clark took possession, and that Lane became president after possession of its property had finally passed from the Company.

But it is impossible that at any time after the Ellis suit was begun (and no fraud before that time is suggested) a default would have been fraudulently permitted. On Aug. 2, 1870, one month after the Ellis bill was filed, the property passed into the possession of the Supreme Judicial Court of Massachusetts, and remained there until June, 1875, when, by the order of that court, it was transferred to the New York & New England Railroad Company. During the first of these five years, it was managed by receivers who made monthly reports to the court (*p.* 157). During the other four, it was managed by the trustees, who made semi-annual reports to the court (*p.* 163), from accounts open to the inspection of the Company and the bondholders (*p.* 162).

The whole management was open, the accounts were first monthly and afterward every six months spread upon the public records of the court.

4. Another preposterous allegation is that the State of Massachusetts having, through investigation by committees of its legislature and its governor and council, ascertained the fact that all the bonds then remaining were, by the terms of the mortgage, reserved for retiring underlying liens, lent to the Company State scrip in exchange for Berdell bonds, and by the terms of the loan required the proceeds of the scrip to be devoted to other purposes than retiring the underlying liens (*pp.* 31 *and* 32).

A reference to the statute referred to on lines 7 and 8 of page 31 (*St.* 1867, *c.* 284) shows that the legislature provided as conditions precedent to the issue of any State scrip: (1) That the Governor and council and the Attorney-General should be satisfied that the Berdell mortgage had "been duly executed and recorded" (§ 2); (2) that, in addition to the provision made by the Berdell mortgage for all underlying liens, those on a portion of the road should be extinguished, or all but $1,000,000 of them should be extinguished and a bond should be given to protect the State against such liens (§ 2) (this being necessary to meet the contingency of the Berdell bonds not being worth par, as the underlying bonds confessedly were); (3) that the amount of State scrip issued should always be half that previously expended by the Company in completing the road (§ 2), and should be issued against Berdell bonds thirty-three per cent. more in amount than the amount of the scrip (§ 3), and, finally (4), that a special commission should be appointed for the purpose (§ 6).

That the State, which had been so careful to guard itself against loss, should have knowingly taken bonds reserved for and belonging to others, cannot by any possibility be true.

II.

Impossible and inconsistent allegations as to bankruptcy proceedings.

In the original bill, the plaintiff alleged that the Boston, Hartford & Erie Railroad Company had been duly adjudicated a bankrupt, assignees duly elected, and an assignment of all its property duly made. Upon its being pointed out by demurrer that this was a bar to this bill (*clause* 5, *p.* 62), the plaintiff attempted to avoid the objection by an amendment to the bill, not sworn to, though the bill was under oath, stating that all the bankruptcy proceedings

were void for fraud, and "that all notice or knowledge of said proceedings was wholly concealed from him and said stockholders of said corporation and said Board of Directors," until it was ascertained in the preparation made for the present bill.

(1) The bankruptcy of the Boston, Hartford & Erie Railroad Company has been the subject of seven reported cases: —

Adams v. *Boston, Hartford & Erie Railroad Co.*, 1 Holmes, 30.
Sweatt v. *Boston, Hartford & Erie Railroad Co.*, 3 Cliff. 339.
In re Boston, Hartford & Erie Railroad Co., 5 N. B. R. 230.
In re Boston, Hartford & Erie Railroad Co., 5 N. B. R. 232.
In re Boston, Hartford & Erie Railroad Co., 5 N. B. R. 233.
In re Boston, Hartford & Erie Railroad Co., 6 N. B. R. 210.
In re Boston, Hartford & Erie Railroad Co., 6 N. B. R. 222.

And the assignees have been parties in eight more reported cases: —

Dillon v. *Barnard*, 21 Wall. 430.
Clark v. *Barnard*, 108 U. S. 436.
Dillon v. *Barnard*, 1 Holmes, 386.
Bradley v. *Farwell*, 1 Holmes, 433.
Bradley v. *Healey*, 1 Holmes, 451.
Barnard v. *Norwich & W. R.R.*, 4 Cliff. 351.
Barnard v. *Hart*, 3 Fed. R. 552.
Bradley v. *Adams Ex. Co.*, 3 Fed. R. 895.

Reference to the first two cases shows that it is impossible that there should have been any fraud in the bankruptcy proceedings on the part of the petitioner. B. F. Butler, the plaintiff's senior counsel in this case, was the senior counsel for Adams, the petitioner, in the first case, and for Adams and the assignees in bankruptcy in the second case (1 Holmes, 30; 3 Clifford, 339).

Reference to the case in the Circuit Court for the District of Connecticut shows that it cannot by any possibility be true that Lane was furthering the petition in Massachusetts in collusion with Adams. In the Connecticut proceedings in bankruptcy, Adams was allowed to intervene, on the ground that the Company itself, of which Lane was then the executive officer, was in collusion with Alden, the petitioning creditor in Connecticut, and had therefore omitted to set up in defence of the Connecticut petition, the fact that a prior petition was pending in Massachusetts (6 *N. B. R.* 210, 220).

(2) It is impossible that these proceedings were wholly concealed from the stockholders and directors.

The Directors "were friendly to his [Lane's] designs, who [and they] would and did co-operate with him" (*p.* 18, *line* 16).

It does not appear what stockholders are referred to.

The allegation is, "All notice and knowledge of said proceedings were wholly concealed from him and said stockholders."

"From him": Graham was not a stockholder at the time of the adjudication. It is merely alleged that "for several" years last past he has been a stockholder (*p.* 3). Two of the plaintiffs, Raymond and Carey, did not acquire their shares until 1872 (*pp.* 61, 62); and there is no allegation as to when Kelly or his intestate acquired his share.

It does not appear that the same is not true of all the other present stockholders.

III.

The plaintiff professes to annex a copy of the record of the Ellis suit and of the bankruptcy proceedings.

(1) The allegation as to the Ellis record is "copies of all which records, decrees, and proceedings" your orator annexes (*p.* 76).

The allegation as to the bankruptcy is similar (*p.* 76).

(2) The Ellis record contains in itself proof that it is incomplete. The order discharging the receivers recites a decree of June 12, 1875 (*p.* 219); but no copy of that decree is to be found in the record, and it is evident that there are numberless other omissions; it is impossible that no act was done in the Ellis suit between December, 1872, when Eldridge filed his demurrer, and Sept. 9, 1879, when the receivers were discharged (*see Index to Ellis suit, Brief, p.* 84).

The case of *Sweatt* v. *B., H. & E. R.R. Co.*, and those to which the assignees have been parties, show that the record of the bankruptcy proceedings is incomplete. According to record annexed, no action has been taken since the adjudication was made and Sweatt brought his supervisory petition; that is to say, Sweatt's petition has never been decided, no assignees have been elected, no assignment made, and no debts collected or dividends paid by the assignees.

W. G. RUSSELL,
WILLIAM CALEB LORING,
Of counsel.

STATE STATUTES CITED BY APPELLEES.

MASSACHUSETTS STATUTES.

[1866.]—CHAPTER CXLII.

An Act concerning the Boston, Hartford and Erie Railroad Company.

Be it enacted, etc., as follows:—

Section 1. The proceedings of the Boston, Hartford and Erie Railroad Company, whereby, by indenture dated March nineteenth, eighteen hundred and sixty-six, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, trustees of the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed.

Section 2. Whenever, and as soon as any bonds authorized to be issued under said indenture shall be created, issued, negotiated and sold, the holders of the six per cent. bonds issued by the Boston and New York Central Railroad Company, secured by their mortgage dated March seventh, in the year eighteen hundred and fifty-four, and the holders of the six per cent. bonds and mortgage notes, issued by the New York and Boston Railroad Company, and secured by their mortgage dated December thirtieth, in the year eighteen hundred and sixty-two, and each of them shall have the right within two years from the time when any of said bonds under said indenture shall be created, issued, negotiated and sold, to exchange their said bonds or mortgage notes for the bonds to be issued under said indenture, upon the following terms, to wit: . . . And the holders of the seven per cent. bonds issued by the Boston, Hartford and Erie Railroad Company, and secured by their mortgage dated February second in the year eighteen hundred and sixty-four, and each of them, shall have the right within the same time to exchange their said bonds for the bonds to be issued under said indenture upon the following terms, to wit: upon the surrender to the said Boston, Hartford and Erie Railroad Company of said bonds of the Boston, Hartford and Erie Railroad Company, with all

the unpaid coupons, the said Boston, Hartford and Erie Railroad Company shall give in exchange seven per cent. Boston, Hartford and Erie Railroad bonds, to be issued under said indenture for the amount so surrendered, with certificates as aforesaid for all sums smaller than one thousand dollars.

SECTION 3. Said mortgage shall be recorded in the registry of deeds in the several counties of Massachusetts in which said railroads and property may be situate; and said record shall be deemed sufficient record of the personal estate as well as of the real estate mortgaged.

SECTION 4. This act shall take effect upon its passage.

Approved April 12, 1866.

[1868.] — CHAPTER CXLV.

An ACT concerning the Boston, Hartford and Erie Railroad Company.

Be it enacted, etc., as follows:

SECTION 1. The Boston, Hartford and Erie Railroad Company, heretofore created in the State of Connecticut, by the legislature thereof, and acting within this Commonwealth and recognized by acts heretofore passed by its legislature, is hereby declared to be a corporation by that name and vested with all the franchises, powers and privileges, and subject to all the restrictions, duties and liabilities set forth in the general laws which now are or hereafter may be in force relating to such corporations; and the acts of said company in forming a union or connection with one or more railroad companies in the States of Rhode Island, Connecticut and New York, with a view of creating a continuous line of railroad from Boston to connect with the railroad of the Erie Railway Company in New York, and the deeds, leases, contracts and arrangements in respect to the same, so far as they affect the said continuous line in this Commonwealth and the union of this corporation with said companies, be and the same are, hereby ratified and confirmed as fully as if the same had originally been made or done under and by virtue of a special law of this Commonwealth. And the said Boston, Hartford and Erie Railroad Company is hereby substituted in the place and vested with all the franchises, rights, property and powers, and is subject to all the duties and liabilities of the Southern Midland Railroad Company, which was

created by an act of this Commonwealth passed the twenty-eighth day of March, in the year eighteen hundred and sixty-three. But nothing in this act shall affect, or in any way impair any outstanding liens, mortgages or other claims or incumbrances upon either or any of said railroad companies, or their franchises or property.

SECTION 2. The capital stock of said Boston, Hartford and Erie Railroad Company shall not exceed the sum of twenty-five million dollars, without the consent of this Commonwealth.

Approved April 29, 1868.

[1873.]— CHAPTER CCLXXXIX.

An Act concerning the New York and New England Railroad Company.

Be it enacted, etc., as follows : —

SECTION 1. The proceedings of the holders of the bonds secured by mortgage, dated March nineteen, eighteen hundred and sixty-six, from the Boston, Hartford, and Erie Railroad Company to Robert H. Berdell and others, whereby they have formed a corporation under the name of the New York and New England Railroad Company, are ratified and confirmed; and said New York and New England Railroad Company is declared, made and confirmed a body corporate by that name, and vested with all the franchises, powers and privileges and subject to all the restrictions, duties, and liabilities set forth in the general laws which now are or hereafter may be in force, relating to railroad corporations.

SECTION 2. The capital stock of said company shall not exceed two hundred thousand shares of one hundred dollars each; and the same may be issued to the holders of said bonds upon the surrender thereof to said corporation as provided in said mortgage, at the rate of ten shares for every bond of one thousand dollars so surrendered. At all meetings of said corporation, each stockholder shall be entitled to one vote for each share of stock held by him.

SECTION 3. Said corporation, upon paying and indemnifying the trustees under said mortgage for their services and liabilities as set forth in said mortgage, may take a conveyance by deed from the trustees under said mortgage of all the railroads, property, premises, estate, and franchises held by them under said mortgage, as is therein provided: and thereupon all the rights, powers, and franchises heretofore granted to or held by the Boston, Hartford and

Erie Railroad Company, shall enure to and vest in said New York and New England Railroad Company.

SECTION 4. For the purpose of enabling said corporation to take up and discharge any and all liens and incumbrances existing upon said railroads and upon any portion thereof, and to perfect its title therein, to complete said railroads, to purchase and provide terminal facilities and to properly equip and maintain said roads, said New York and New England Railroad Company may mortgage its railroads, property and franchises in a sum not exceeding ten millions of dollars, the bonds secured by said mortgage to be payable at not exceeding fifty years from their date, and to bear interest not exceeding seven per centum per annum, and to be made payable in federal or sterling currency as said corporation may elect.

SECTION 7. This act shall take effect upon its passage.

Approved May 15, 1873.

[1882.]—CHAP. CCXL.

AN ACT TO PROVIDE FOR THE SALE OR EXCHANGE OF THE SHARES OF THE COMMONWEALTH IN THE STOCK OF THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Be it enacted, etc., as follows:

SECTION 3. . . . The New York and New England Railroad Company may issue coupon or registered bonds for one thousand dollars each, in pieces of one thousand dollars or of such multiples thereof as the treasurer of the Commonwealth may request, payable twenty years from the date thereof, with interest semi-annually at the rate of six per centum per annum, to an amount sufficient to pay for said shares, and shall secure the said bonds by a mortgage of its road, franchise, equipment, and other property which shall be approved by the governor and council, and made to three trustees, who shall be so approved and of whom two at least shall at all times be residents of the Commonwealth. Such mortgage shall be made expressly subject to the incumbrance of any legally authorized mortgage already existing. . . .

SECTION 4. After the sale or assignment of said shares as hereinbefore provided, said corporation may from time to time, for the purpose of procuring equipment, increasing its terminal facilities, laying a second track and providing for its outstanding unsecured

liabilities, issue like bonds, secured by such mortgage, to an amount which, together with those issued by authority of the preceding section, shall not exceed five million dollars.

SECTION 6. This act shall take effect upon its passage.

Approved May 19, 1882.

PUBLIC STATUTES OF MASSACHUSETTS.

CHAP. 170.

SEC. 68. All acts of incorporation shall be deemed public acts, and, as such, may be declared on and given in evidence.

CONNECTICUT STATUTES.

[1863.]

Incorporating the Boston, Hartford and Erie Railroad Company.

WHEREAS, by grants heretofore made to sundry railroad corporations, this State has declared her desire and policy to be that railroad communication shall be opened through the central portion of this state, extending to, and connecting with the Erie railroad at Fishkill on the west, and the harbor of Boston and the city of Providence on the east: *and whereas* there still remains some portions of said line to be constructed, which unbuilt portions the present grantees of power to build have been unable to finish: *and whereas* there is good cause to believe that under one corporation said line can be completed, and so answer the end and purpose of the creation of several corporations: therefore,

Resolved by this General Assembly,

SEC. 1. That Joseph W. Clark, Albert G. Farwell, James A. Dupee, Samuel P. Benson, Gilbert W. Phillips, Edward Crane, Henry Sayles, S. Augustus Dix, Alfred Smith, George M. Bartholomew, Calvin Day, Edmund G. Howe, Charles Hart, Shubael Hutchens, Orry Taft, R. M. Clark, and Alonzo Milliken, with such other persons as they shall associate with them for that purpose, and their successors, are hereby constituted a body politic and corporate by the name of the Boston, Hartford and Erie Railroad Company, and by that name to sue and be sued, to plead and be impleaded in any court in this State, to have and make a common

seal, and the same to break, alter or renew at pleasure, with the powers and privileges, and subject to the duties, restrictions and liabilities of the statute laws of this State, passed May session, 1849, entitled An act relating to railroads, and of the several acts passed or that may be passed in addition to or in alteration of said act.

SEC. 2. The capital stock of said company shall be ten millions of dollars, to be divided into shares of one hundred dollars each, with the privilege of increasing said capital stock to fifteen millions, and such company may issue and dispose of the same from time to time, to such an amount within said limits as may be necessary to purchase the franchises, railways, or railway property they are authorized to purchase by this act, and also to purchase any bonds or other indebtedness of the corporation whose franchise, railway or property they shall obtain under the provisions of this act, and to finish such portions of said lines as are yet unbuilt, and to complete their entire line of railway.

SEC. 3. . . . And after the books are closed and the stock apportioned and assigned as aforesaid, the persons named in the first section hereof, or a majority of them, shall call the first meeting of the stockholders of said company in such way and at such time and place as they may appoint, for the choice of directors of said company, who shall hold office for one year, and until others are elected in their place, and, in all meetings of the stockholders of said company each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person or by lawful proxy; and in case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, such company shall not for that cause be deemed dissolved, but such election may be held on any day which shall be appointed by the directors, and lawful notice of the time and place given.

SEC. 10. This act may be altered, amended or repealed at the pleasure of the general assembly.

Approved June 25, 1863.

[1866.]

An ACT concerning the Boston, Hartford and Erie Railroad Company.

Resolved by this Assembly, SEC. 1. That the proceedings of the Boston, Hartford and Erie Railroad Company, whereby by indent-

ure dated March nineteenth, eighteen hundred and sixty-six, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed; and said company is authorized to create, issue and dispose of the mortgage bonds to be secured thereby, in form and manner as in said mortgage is provided.

SEC. 2. Whenever and as soon as any bonds authorized to be issued under said indenture shall be created, issued, negotiated and sold, the holders of the six per cent. bonds issued by the Boston and New York Central Railroad Company, secured by their mortgage dated March seventh, eighteen hundred and fifty-four, and the holders of the six per cent. bonds and mortgage notes issued by the New York and Boston Railroad Company, and secured by their mortgage dated December thirtieth, eighteen hundred and sixty-two, and each of them, shall have the right within two years from the time when any of said bonds under said indenture shall be created, issued, negotiated and sold, to exchange their said bonds or mortgage notes for the bonds to be issued under said indenture, upon the following terms, to wit: . . . And the holders of the seven per cent. bonds issued by the Boston, Hartford and Erie Railroad Company and secured by their mortgage dated February second, eighteen hundred and sixty-four, and each of them shall have the right, within the same time to exchange their said bonds for the bonds to be issued under said indenture, upon the following terms, to wit: . . .

SEC. 3. Said mortgage shall be recorded in the office of the Secretary of this State, which shall be a sufficient recording of the same.

Approved May 11, 1866.

[1873.]

An Act concerning the New-York and New-England Railroad Company.

Resolved by this Assembly:

SECTION 1. The proceedings of the holders of the bonds secured by mortgage, dated March 19, 1866, from the Boston, Hartford, and Erie Railroad Company to Robert H. Berdell and others,

whereby they have formed a corporation under the name of the New-York and New-England Railroad Company, are hereby ratified and confirmed; and the said New-York and New-England Railroad Company is hereby declared, made, and confirmed a body corporate by that name, and vested with all the franchises, powers, and privileges, and subject to all the restrictions, duties, and liabilities set forth in the general laws which now are, or hereafter may be in force, relating to railroad corporations.

SEC. 2. The capital stock of said company shall not exceed two hundred thousand shares, of one hundred dollars each, and the same may be issued to the holders of said bonds upon the surrender thereof to said corporation as provided in said mortgage, at the rate of ten shares for every bond of one thousand dollars so surrendered. At all meetings of said corporation, each stockholder shall be entitled to one vote for each share of stock held by him.

SEC. 3. Said corporation, upon paying and indemnifying the trustees under said mortgage for their services and liabilities, as set forth in said mortgage, may take a conveyance by deed from the trustees under said mortgage of all the railroads, property, premises, estate, and franchises held by them under said mortgage, as is therein provided; and thereupon all the rights, powers, and franchises heretofore granted to or held by the Boston, Hartford and Erie Railroad Company, shall enure to and vest in said New-York and New-England Railroad Company.

SEC. 4. For the purpose of enabling said corporation to take up and discharge any and all liens and incumbrances existing upon said railroads, and upon any portion thereof, and to perfect its title therein to complete said railroads, to purchase and provide terminal facilities, and to properly equip and maintain said roads, said New-York and New-England Railroad Company may mortgage its railroad, property, and franchises, in a sum not exceeding ten millions of dollars, the bonds secured by said mortgage to be payable at not exceeding fifty years from their date, and to bear interest not exceeding seven per centum per annum, to be made payable in federal or sterling currency, as said corporation may elect. It shall be the duty of the comptroller of public accounts to register in his office any bonds issued under the authority of this act, and no certificate to him of the amounts expended upon the several railroads mortgaged shall be required. Said mortgage may be made to such persons in trust for the security of the bondholders, as said corpora-

tion may appoint, and shall be recorded in the office of the secretary of this state, which shall be a sufficient recording of the same.

SEC. 7. This act shall take effect from and after its passage.

Approved May 29, 1873.

GENERAL STATUTES OF CONNECTICUT (Revision of 1875.)

CHAP. 7.

SECTION 1. All acts of incorporation passed by the General Assembly may be declared on or pleaded as public acts.

[1882.]

[House Joint Resolution No. 222.]

[232.]

AMENDING THE CHARTER OF THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Resolved by this Assembly:

SEC. 2. Said company may issue, and the comptroller shall, before such issue, register in his office, its coupon or registered bonds for a sum of not less than one thousand dollars each, and to an aggregate amount, not exceeding five millions of dollars, par value, payable, with interest semi-annually at six per cent. per annum, twenty years from date; and may secure said bonds by a mortgage of its road, franchises, equipment, and property, both those owned at the time and those thereafter to be acquired, and embracing the several roads of said company in the states of Massachusetts, Rhode Island, Connecticut, and New York. Said mortgage shall be made to three trustees, to be nominated by said company, and approved by the governor of this state, of whom one shall be a resident of this state; and shall be expressly made subject to the incumbrance of any existing legally authorized mortgage debt, which is a prior lien on the property or franchises so to be mortgaged, or on any part thereof.

Approved, April 26, 1882.

RHODE ISLAND STATUTES.

[1865.]

An Act to ratify and confirm the Sale of the "Hartford, Providence and Fishkill Railroad," to the "Boston, Hartford and Erie Railroad Company."

It is enacted by the General Assembly, as follows:

Section 1. The sale and transfer of the Hartford, Providence and Fishkill railroad, its property and franchises to the Boston, Hartford and Erie railroad company, a corporation created by the General Assembly of the State of Connecticut, as evidenced by the deed of said Hartford, Providence and Fishkill railroad company, dated the twenty-eighth day of August, 1863, and recorded in the city clerk's office of the city of Providence in book No. 167, page 13, of the records of deeds of real estate in said city, is hereby ratified and confirmed, so far as said railroad is situated in this State; and said Boston, Hartford and Erie railroad company, by that name, shall, and may have, use, exercise, and enjoy all the rights, privileges, and powers heretofore granted and belonging to said Hartford, Providence and Fishkill railroad company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of this State. And said Boston, Hartford and Erie railroad company, in the transportation of freight or passengers to and from any point or place in Rhode Island to and from any point westerly of Willimantic on the line of its railroad, built or to be built, any part of which shall be located in this State, shall not charge a greater rate for the whole distance than to and from any point or place in Massachusetts, to and from the same points or places westerly of Willimantic.

Sec. 2. One or more of the directors of said Boston, Hartford and Erie railroad company shall, at all times, be an inhabitant of this State, on whom process against said company may be lawfully served; and said company shall be held to answer in the jurisdiction where the service is made and the process is returnable.

Sec. 5. This act shall not take effect until accepted by a vote of the stockholders of said Boston, Hartford and Erie railroad company, at a stockholders' meeting specially called for that purpose. [January, 1865, p. 248.]

JANUARY, 1866.

An ACT concerning the Boston, Hartford and Erie Railroad Company.

It is enacted by the General Assembly as follows: —

SECTION 1. The proceedings of the Boston, Hartford and Erie Railroad Company, whereby, by indenture dated March nineteenth, eighteen hundred and sixty-six, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed.

SEC. 2. Whenever and as soon as any bonds authorized to be issued under said indenture shall be created, issued, negotiated and sold, the holders of the six per cent. bonds issued by the Boston and New York Central Railroad Company, secured by their mortgage, dated March 7th, 1854, and the holders of the six per cent. bonds and mortgage notes issued by the New York and Boston Railroad Company, and secured by their mortgage, dated December 30th, 1862, and each of them, shall have the right within two years from the time when any of said bonds under said indenture shall be created, issued, negotiated, and sold, to exchange their said bonds or mortgage notes for the bonds to be issued under said indenture, upon the following terms, to wit: . . . And the holders of the seven per cent. bonds issued by the Boston, Hartford and Erie Railroad Company, and secured by their mortgage dated February 2d, 1864, and each of them, shall have the right, within the same time, to exchange their said bonds for the bonds to be issued under said indenture, upon the following terms, to wit:

SEC. 3. It shall be sufficient and legal notice to all persons whatsoever, of any and all incumbrances on the real and personal estate of said Boston, Hartford and Erie Railroad Company, under and by virtue of the mortgage mentioned in the first section of this act, if said mortgage shall be recorded in the office of the Secretary of State of this State, whose duty it shall be to record the same in a book to be kept for that purpose at the expense of said corporation, and no other record shall be necessary.

SEC. 4. This act shall take effect from and after the passage thereof.

[1878.]

An Act concerning the New-York and New-England Railroad Company.

It is enacted by the General Assembly as follows :

SECTION 1. The New-York and New-England railroad company, being a corporation formed under the provisions of a mortgage made by the Boston, Hartford and Erie railroad company to Robert H. Berdell, and others, trustees, and ratified and confirmed by the general assembly at the January session, 1866, is hereby recognized and declared to be a corporation invested with all the powers, privileges and franchises, and subject to all the duties, liabilities and restrictions of said Boston, Hartford and Erie railroad company as is provided in said mortgage, and the proceedings of the holders of the bonds secured by said mortgage, whereby they have formed said corporation, are hereby ratified and confirmed.

SEC. 2. The capital stock of said New-York and New-England railroad company, shall not exceed two hundred thousand shares of one hundred dollars each; and the same may be issued to the holders of said bonds upon the surrender thereof to said corporation as provided in said mortgage, at the rate of ten shares for every bond of one thousand dollars so surrendered. At all meetings of said corporation, each stockholder shall be entitled to one vote for each share of stock held by him.

SEC. 3. Said corporation upon paying and indemnifying the trustees under said mortgage for their services and liabilities as set forth in said mortgage, may take a conveyance by deed from the trustees under said mortgage of all their right, title and interest in and to the railroad, property, premises, estate and franchises held by them under said mortgage, as is therein provided; and thereupon all the rights, powers and franchises legally vested in the Boston, Hartford and Erie railroad company shall enure to and vest in said New York and New England railroad company: Provided, however, that nothing in this act contained shall impair any claim, right or title which has been obtained, or is held by any person or other corporation.

SEC. 4. For the purpose of enabling said corporation to take up and discharge any and all liens and incumbrances existing upon said railroad, and upon any portion thereof, and to perfect its title therein, to complete said railroad, to purchase and provide terminal facilities, and to properly equip and maintain said road, said New-

York and New-England railroad company may mortgage its right, title and interest in and to its railroad, property and franchises in a sum not exceeding ten millions of dollars, the bonds, secured by said mortgage, to be payable at not exceeding fifty years from their date, and to bear interest not exceeding seven per centum per annum, and to be made payable in federal or sterling currency as said corporation may elect; and said mortgage shall be recorded in the office of the secretary of state, and such recording shall be a sufficient record thereof, and no other record shall be necessary.

SEC. 5. This act shall take effect from and after its passage.

Passed May 29, 1873.

PUBLIC STATUTES OF RHODE ISLAND.

CHAP. 24.

SECTION 15. Every act of incorporation shall be so far deemed a public act, that the same may be declared on and given in evidence without specially pleading the same.

[1882.]

AN ACT CONCERNING THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

It is enacted by the General Assembly as follows:—

SECTION 1. It shall be lawful for the New York and New England Railroad Company to issue its coupon or registered bonds for a sum not less than one thousand dollars each, and to an aggregate amount not exceeding five millions of dollars, par value, payable twenty years from date with interest at the rate of six per centum per annum, payable semi-annually; and it may secure said bonds by a mortgage of its road, franchises, equipment, and property, both those owned at the time and those thereafter to be acquired. Said mortgage shall be made to three trustees, and shall be expressly made subject to the incumbrance of the first mortgage of said company, executed under authority of section 4 of an act concerning the New York and New England Railroad Company, passed by this assembly at its May session, 1873; and shall be recorded in the office of the secretary of state of this state, and no other record shall be necessary. And said company may, without pre-

sumption of fraud arising therefrom, retain possession of such mortgaged property, real and personal, so long as no default is made under said mortgage, and possession is not taken by said trustees, by reason of any such default.

SEC. 5. This act shall take effect on and after its passage.

[Passed April 20, 1882.]

NEW YORK STATUTES.

CHAP. 385.

AN ACT to consolidate the Boston, Hartford and Erie, the Boston, Hartford and Erie Extension, and the Boston, Hartford and Erie Ferry Extension Railroad Companies.

Passed April 25th, 1864.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Boston, Hartford and Erie Extension railroad company, and the Boston, Hartford and Erie Ferry Extension railroad company, may both, or either, sell and convey to the Boston, Hartford and Erie railroad company the franchise and property of said several corporations, upon such terms as may be mutually agreed upon; and whenever certificates, under oath, of said Boston Hartford and Erie railroad company, and a like certificate, under oath, of the other contracting corporation shall be lodged in the office of the Secretary of State, showing such sale and conveyance, and containing a full description of the rights and property conveyed, then, and in such case, such sale and conveyance shall be effectual in law to pass title to the franchise and property sold, conveyed and described in such certificate, without other or further registry of the instrument of conveyance. And on the leaving of such certificate as above provided, the Secretary of State shall file and record the same, and said Boston, Hartford and Erie railroad company shall become possessed of the rights of charter and property sold, conveyed and described in said certificates, and may have, hold and use the same in their own name and right as a portion of their railway line and property, and have all the rights the corporation making sale and conveyance had at the time of such conveyance, to construct and operate a railway within the

terminal points designated in the charter of the company making the conveyance, and subject to the laws of this State, passed, or that may be passed, concerning railroad corporations.

§ 2. This act shall take effect immediately, and may be altered, amended or repealed at the pleasure of the legislature.

CHAP. 789.

AN ACT concerning the Boston, Hartford and Erie Railroad Company.

Passed April 24th, 1866.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The proceedings of the Boston, Hartford and Erie railroad company, whereby by indenture dated March 19, 1866, they conveyed their railroad and property in mortgage to Robert H. Berdell, Dudley S. Gregory and John C. Bancroft Davis, trustees for the bondholders in said mortgage to secure the holders of said bonds the payment of the same, are hereby ratified and confirmed.

§ 2. The record of said mortgage as a mortgage of real estate in the several counties in this State in which the said railroad may be situate shall be deemed a sufficient record of the personal as well as of the real estate mortgaged.

§ 3. This act shall take effect immediately.

CHAP. 550.

AN ACT to extend the time for the completion of the Boston, Hartford and Erie Railroad by the New York and New England Railroad Company.

Passed May 21st, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The time for the completion of the Boston, Hartford and Erie Railroad is hereby extended for the period of two years from the time now fixed by law for the completion of the same.

§ 2. The benefit of this extension of time shall vest in the New York and New England Railroad Company, a corporation formed under the provisions of the mortgage, ratified and confirmed

by chapter seven hundred and eighty-nine of the laws of eighteen hundred and sixty-six.

§ 3. For the purposes of enabling said New York and New England Railroad Company to complete its railroads in the States of New York, Connecticut, Massachusetts and Rhode Island, to take up and discharge any prior liens and incumbrances upon the same, to provide terminal facilities and to properly equip and maintain the same, it may mortgage its railroads, property and franchises, in any manner not inconsistent with the laws of this State. The bonds secured by said mortgage to be payable at not exceeding fifty years from their date, and to bear interest at not exceeding seven per centum per annum.

§ 4. This act shall take effect immediately.

GENERAL STATUTES OF MASSACHUSETTS.

CHAPTER 140.

§ 1. After the breach of condition of a mortgage of real estate, the mortgagee may recover possession of the mortgaged premises by action in the manner hereinafter provided; or he may make an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming the premises; and such possession, obtained in either mode, continued peaceably for three years, shall forever foreclose the right of redemption.

§ 2. When an entry for breach of the condition is made without a judgment, a memorandum or certificate thereof shall be made on the mortgage deed and signed by the mortgagor or the person claiming under him, or a statement of two competent witnesses to prove the entry shall be made and sworn to before a justice of the peace; and the same shall within thirty days after the entry be recorded in the registry of deeds for the county or district where the land lies, with a note of reference from each record to the other, if the mortgage is recorded in the same registry. No such entry shall be effectual for the purposes mentioned in the preceding section, unless a certificate or deposition in proof thereof is thus made and recorded.

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